

GOEBEL, Jr

The International Responsibility of  
States for Injuries Sustained by  
Aliens on Account of Mob Violence,  
Insurrections, & Civil Wars

Political Science

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THE INTERNATIONAL RESPONSIBILITY OF  
STATES FOR INJURIES SUSTAINED BY  
ALIENS ON ACCOUNT OF MOB VIOLENCE,  
INSURRECTIONS, AND CIVIL WARS

BY

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A. B. University of Illinois, 1912

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THESIS

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Julius Gaebel Jr.

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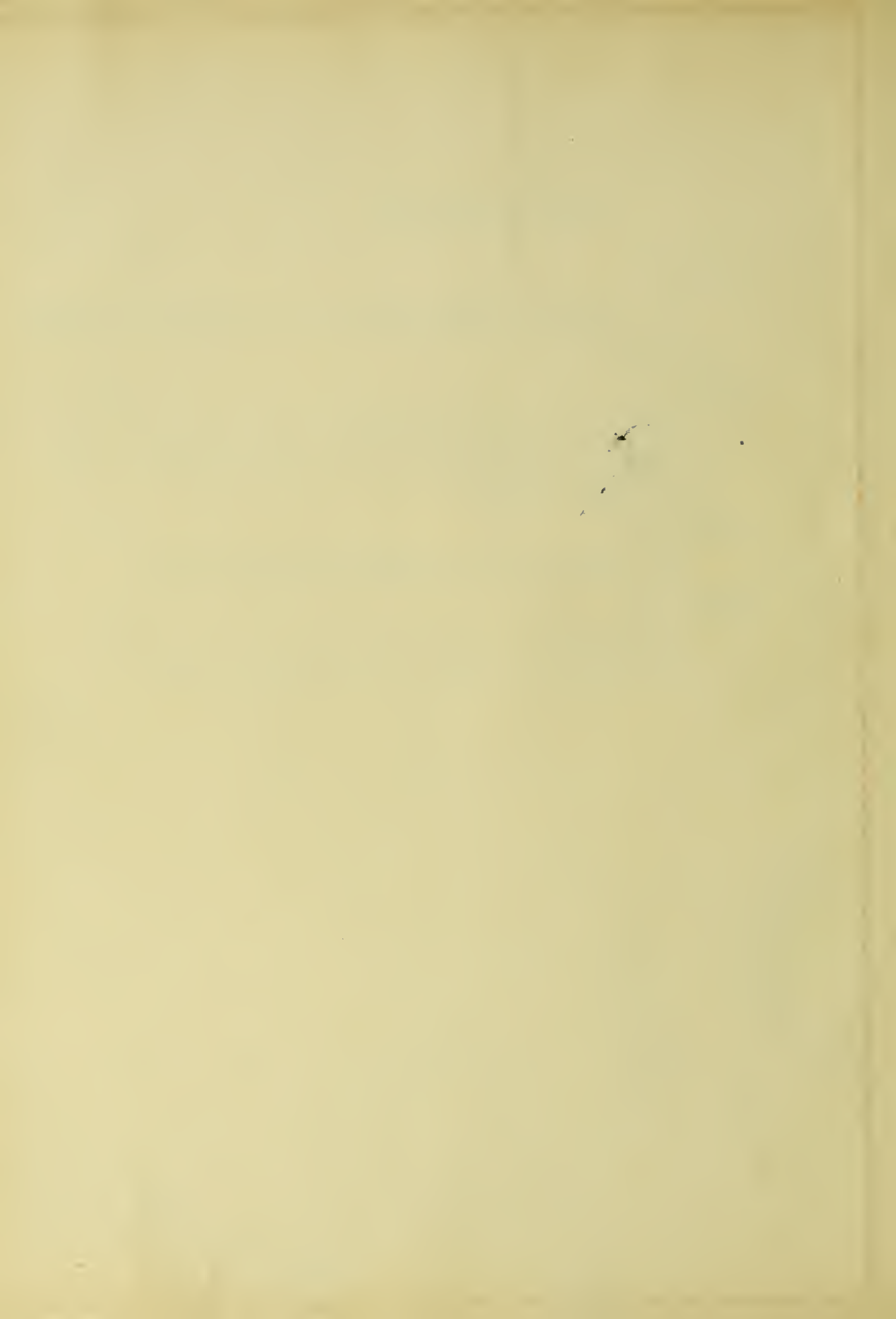
Final Examination





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## Chapter I.

## The History and Development of the Theory of Responsibility.

It is undoubtedly true that the concept of natural law of the seventeenth century, which found such favor with Grotius, was instrumental in perfecting many of the legal precepts which have survived to this day. On the other hand, when Bismarck uttered the famous words, 'Mit juristischen Theorien lässt sich Auswärtige Politik nicht treiben', he pronounced a truth which, however, paradoxical it may sound, is of great significance to the student of International Law. And so, in the problems with which the present paper is to deal, namely, the international responsibility of a state for injuries sustained by aliens on accounts of intestine commotions of various sorts, this fact must be continually kept in mind, for, here, as elsewhere, the danger of allowing preconceived ideas to prejudice one's verdict should be most carefully guarded against. It is here, moreover, where many writers have come to grief, for, failing to remember that international law is built up of the practice of states, they have allowed themselves to be led astray, and to interpret facts in terms of their predetermined theories. In spite of this fact, however, there can be not doubt that the early development of the practice which states observed in regard to aliens was very largely influenced by certain fundamental theories relative to the respective rights of nationals and foreigners. Later, too, in the time of great constructive pub-





licists, from Grotius to Vattel, the political theories of the time exerted a considerable influence upon these writers and through them upon the governments themselves. In more recent times, however, especially since our political life has divorced itself from the fallacious concepts of the political theorists of the seventeenth and eighteenth centuries, the practice of states has been the sole index of what is right and what is wrong in its international existence. It is with the development of these theories with which the present chapter shall have to do.

There is a striking feature of the whole history of responsibility which deserves our close attention in as much as it is fundamental to the whole practice of states and has given rise to the conflicting views in regard to the matter. It is the question of whether the responsibility of states for aliens injured in civil commotions is a matter which should be regulated by municipal law or whether it should be reserved to international jurisprudence alone. The basis for the contentions of the publicists favoring regulation by municipal law is what they at least, believe to be the antiquity of the law in this regard. Those who favor the rules of international law rely upon the practice of the last century for support which, in turn, is based upon the somewhat restricted views of the early publicists, but which underwent a very complete transformation. Nor have these questions been confined to theorists alone, but since the time when the question of the responsibility of states for aliens began to be of importance in international law, the conflict of laws and of authority has been incessant, for obviously, if a state is able to settle an embarrassing matter by its own jurisprudence, it is likely to choose such a course and to



deny its liability in international law. On the other hand there is another point worthy of notice, which opposes this view, and which it would be well to keep in mind, namely that just as the condition of aliens improves concomitantly with the amelioration of the condition of nationals just so much the more is a state willing to acknowledge its international responsibility. This fact was brought out by the developments of the 19.<sup>th</sup> century as the discussion in subsequent chapters will show.

To speak more accurately, therefore, it is with a conflict of laws with which this paper shall have to do and it shall be our purpose to endeavor to decide which view is the more rational; whether responsibility shall be regulated by municipal law or by international law, and which of the two views is historically the more correct.

We indicated before that the regulation of responsibility by municipal law was believed by many to be of greater antiquity but this view is only partly true. It is fundamental to the discussion that the principle be here laid down that the question of responsibility in the sense in which we shall understand it, is essentially Teutonic in origin and character, and that it proceeded from the law and custom of the early Germanic tribes. The influence which classical jurisprudence exerted upon the theory was a tardy one and does not appear clearly until the time of Grotius, who was the first to apply the principles of Roman law to this Germanic system. The early treatment of responsibility for aliens, moreover, cannot be said to have been distinctly municipal in character, for in the early Germanic epoch the municipal and international law in so far as we may speak of an international law at that time





were so closely interrelated that the two were not always distinguishable from each other. This state of affairs existed up until the time of Grotius, when the latter really first drew the line of demarcation, a process which was facilitated by the fact that in the development of the theory of responsibility it had assumed more the aspect of a municipal than an international institution. But we are anticipating. Let us return to the status of the theory of responsibility among the early Teutons where it originated, keeping in mind the various relations which have been indicated.

The character of the treatment accorded to aliens among the Germanic tribes was closely bound up with the peculiar political organization of these nations. The essential element of Teutonic political life at that time was the clan, an organization of blood relatives, who lived in intimate relations of fidelity to each other. It is true that these clans were constituent elements of great nations, but in the earliest times there was no national consciousness, and the only binding tie was recognized to be that of blood relationship alone.

Since the whole political life of the clans was based upon this relationship and since all law proceeded from the former, anyone without the jurisdictional limits of the clan was a foreigner. **1.** He was a man without any known kin, one who was born without the confines of the locality or of the mark; or, in his capacity as a member of another clan the character of the treatment accorded him may be said to have been essentially one at inter-

**1.** Wargangus, advena, albanus peregrinus etc. In short these are the terms used cf. Grimm, Deutsche Rechtsalterthümer, 396 1st. ed.



national law. In the earliest times it is clear that the foreigner possessed no rights whatever, and, in this respect, had a status similar to that of the slave. The freeman alone enjoyed legal rights. 1. The foreigner could not make any demands upon the protection and peace of the community in which he happened to be. As a foreigner, he had no wergeld, and even if compensation could have been exacted from his murderer, there would be no relatives to enforce the demand. Thus the Visigothic law provided that the murderer of a foreigner was not responsible to any 'ätter bot' and did not become outlaw. 2. There were exceptions to the rule, in the case of a foreigner protected by the Gastrecht - right of hospitality - or by a patron. 3. This state of affairs was changed presently by the growing consciousness of a political life beyond the mere clan. The first indication of this we find in the Lex Salica the celebrated code which originated in the early part of the sixth century. This law provides 4. 'If any one should kill a native Frank or a barbarian who lives in accordance with the salic law he shall pay 8000 danarii equaling 200 soldi, for the crime.' This accordingly provides for domiciled aliens only, and most astonishingly, it puts them on a footing of equality with the native. The price of a Roman was considerable higher, 300 solidi being the fine for his murder. 5. This lex is perhaps the oldest of all and needs no explanation. It indicates, however, that the foreigner in so far as he was under the laws of the Salic Franks had acquired some rights and was no longer in the position of being completely without the law.

1. Brunner, Grundzüge der Deutschen Rechtsgeschichte, 13 2. Grimm op. cit., I, 397 3. Brunner, op. cit., I, 277 4. XLIII 1 Lex Emend. in Hossels, Lex Salica p. 251 5. ibid. 260





Similarly to this law that of the Ripuarian Franks provided  
 1. that if a Ripuarian kill a foreign Frank, that he shall be fined 200 solidos. The price for a Burgundian was 80 solidos, for an allamanni or Frisian, a Bogian or Saxon 160 solidis, but the Roman busse was only 100 solidi. 2. Evidently the Romans were falling in value.

Similar to the law of the Riparians was that contained in the edict of Rotharius for the Lombardians. This code, which is dated at 644 A.D. provided as follows for aliens. 3.

Omne unaregang - foreigners - qui de exteris fines in regni nostri finibus advenerint, signe sub scuti potestatis nostrae subdederint, legibus langobardum vivere debeant, nisi si alicui legem ad pietatem nostram meruerint...'

No provision was made at that time however for injuries or pre-judice sustained by foreigners. 4.

In this point the laws of the Anglo-Saxons of approximately the same date are more specific. In the laws of Ine 5. which are dated 688-95 but which certainly embody practice which is much older than the date of codification it is provided that 'if anyone kill a foreigner, then the king receives two parts of the wergeld and the third part goes to the son or to the relatives. ' And again 6. 'if the murdered man is without kin, then half belongs to the king and half to the Gilde'. But 7. 'if it should be an abbot or abbess - who protect the man - then they may in the same manner

1. Solun, Lex Ribuarica, p. 36 2. Lex Baiuvariorum, also Mon. Hist. Germ. LIII, p. 294. This refers to travelling aliens.  
 3. Bluhme, Edictus ceteraque Langobardorum Leges, p. 68, 367  
 4. This law is remarkable in that it provides that legitimate offspring of aliens may inherit. 5. Liebermann Gesetz der Angelsachsen I, 199 Ine 223 6. ibid. 23, 1 7. ibid. 23, 2



share the Wergeld with the King.'

These provisions are perhaps the most complete of the earlier laws in regard to foreigners. As has already been indicated, they are of greater antiquity than the date would lead one to suppose and it may be suggested, more free from the influence of Roman jurisprudence than the continental codes, although in respect to aliens the leges of the Teutons certainly bear little or no indication of Roman influence. Up to this period in the history of law, the clan relation was the predominating factor in political life, but from now on the central organization gradually becomes more perfect and the general law codes which are promulgated are of considerably more significance. Nevertheless, the clan relation although succeeded by the national organization continues with unabated vigor within the land itself and still bears the characteristics of international relation which marked its previous existence.

While in the meantime the political organization of the Franks and other Germanic nations was perfecting itself, and on the continent the law became more fixed, chiefly under the guidance of the Merovingian kings who certainly introduced the principles of the law of the church and of the Roman law to a much greater extent, in the code of the Chamavian Franks we find the stipulation<sup>1</sup>. Si wargengum occiderit, solidos 600 in dominico componat,' which is essentially the principle in the code of the Ripuarians, except for the phrase 'in dominico' which indicates the rise of a practice which the laws of Ine already gave voice to, namely the protection of the foreigner by the lord or king an institution which gradually had grown up. In some countries this protection took on a

<sup>1</sup>. Monumenta, Leges V, 813 c. 9





a rather unfavorable aspect. This grew out of the Wildfangrecht of early Frankish law, by which a lord would have claim to all foreigners who had no claimant masters or overlords after a year's sojourn in the land. 1. These men, then, were no longer free, but were the king's men 2. In other localities, the foreigner did not lose his freedom, but he was under the direct protection of the king, and as we shall see presently, special fines had to be paid for breaking the king's peace by injuring him. 3. The practice of protecting foreigners was not a purely altruistic one on the part of the sovereign for according to the prevailing law in most of the nations, the inheritance of the alien fell to the overlord a custom from which the droit d' aubaine of France grew up. The law of Wildfang, it may be said, lasted until late in the middle ages and from it proceeded, too, the law of naufnage which permitted the spoliation and capture not only of the goods but of the persons of ship-wrecked vessels. But let us turn again to England, where the law of the Anglo-Saxons underwent a change of considerable significance.

After the laws of Ine, the next provision of importance is to be found in the laws of Aelfred 4. in the latter part of the ninth century. 'If anyone slay a man thus conditioned namely when he is without kin he shall pay half -wergeld - to the king and half to the Gildergenossen.' This provision is not very different

1. Brunner, 180 2. Grimm, 399 3. Deutsche Rechtsgeschichte, 286  
4. Lieberman, Gesetze, 67



from the law of Ine, and indeed from any of the codes which all in all seem to have a striking resemblance to each other. 1. But near the middle of the tenth century, there appear certain provisions in the Dunsæte, a code of rather mysterious origin, and which was really a form of international agreement between the Welsh and the English 2. which are distinctly individual in character. They provide first that "If a Welshman - from across the river - kill an Englishman, then need he pay across on this side only one half wergeld and just as little need an Englishman - pay- for a Welshman slain - on this side - with more - be he of noble birth or be he of lowly birth, half wergeld shall be the rule." The most interesting provision of the law stipulates that 3. "If one can obtain fulfillment of justice in no other way, from one bank to the other one may take forfeits from every countryman of the debtor."

Thus a system of reprisals is provided for in case justice is denied to an injured alien, which does not differ much from the practice in modern times. The fact that the Dunsæte is of rather uncertain origin makes it difficult to say just to what extent these rules were observed and what their significance was. At any rate, we have here an early recognition of the responsibility of the state for denial of justice to aliens, a fact which in itself is of importance.

The next code which deals to any extent with aliens was that of Eadward of about the year 920. Article 12 provides, 'That if a person seeks to injure a holy man or a foreigner, either in his person or goods then shall the king, in the Daneland, the Jarl and

1. Lieberman, 375 2. It is impossible to say exactly how much borrowing back and forth of laws was done during the middle ages. This was effected chiefly through the church. 3. *ibid.* 2, 2





the bishop of the diocese be the protector of the latter in case he have no other protector., and the former - injurer - make bote to Christ and to the king as is befitting, according to the deed, or he who is king among the people will punish the deed severely.'

The same sort of royal protection is again extended in the laws of Aethelred circa 1614 and those of Cnut, 1027-34, and in both codes the provisions are broader in scope. In Aethelred VIII 33 and 34 **2.** the king is the protector of the ordained or of the foreigner when a person injure him either his property or person, or binds him or beats him, or insults him in any way. The king is likewise given the right of punishing the offender if he does not make bote both to the injured person and the king. IICnut 40 and 41 **3.** simply provides that if anyone injure an alien in any way that the king is his protector and that the guilty party make bote to the king - not to the injured party - or the king will punish.

It may be well to point out at this juncture the exact relations of these laws to the theory of international responsibility in the connections in which this paper is studying it. In the first place we found that the alien's status varied considerably particularly in the matter of indemnities, and that there was a certain responsibility for injury to him. In the second place we found that the alien gradually became the object of special protection by the king, to whom a part of the wergeld was usually paid. It might seem, perhaps, that this was all a matter of municipal law, but as we have already indicated the dual character of the law at this time little need be added. This has been made clear in regard to the first point, but a word of explanation may

**1.** Lieberman, 135 **2.** *ibid.* 267 **3.**



be in place in regard to the special protection of the king or lord over aliens. In the earliest times this protection had the character of a personal prerogative of the king, a right which the latter assumed to be inherent in himself. Nor was this protection purely altruistic in character, but as has been suggested it was a service which was richly remunerated by the escheat of the aliens' property. Gradually as time passed the matters which the king had considered personal prerogative became regarded as belonging to the sovereignty which was inherent in the position, and the protection over aliens was one of the prerogatives which likewise became <sup>an</sup> adjunct of the sovereignty. Then as the idea developed that the ultimate sovereignty rested in the people, this prerogative special protection over aliens was again transferred and the concept arose that the alien was to receive his protection from the nation. This development of the idea of protection of aliens had great weight in the development of municipal law, for it came to be looked upon more as an expression of internal rather than of external sovereignty, a condition which existed at the time when Grotius wrote.

But while this general development was taking place within the English realm at the same time a new phase of clan responsibility appeared in the development of the idea of the liability of the hundred. It is not within the scope of the present discussion to trace the early origin of the custom. 1. The responsibility of the hundred for the death of a foreigner is first concisely expressed in the *Leges Edwardi Confessoris*, a code completed in the early 12th. century, consisting of the supposed customs of the Anglo-Saxons. There can be little doubt but that the code is not entirely 1. Maitland, *Collected Paper I*, 230 *The Crim. Liab. of the Hundred*.





trustworthy in all of its provisions, but certainly there is reason for believing that some of the matter contained therein is authentic. 1.

The articles dealing with murdered aliens are found in connection with the Lex Murdrorum 2. These laws provided that if a man was murdered and the slayer could not be found that 40 marks were to be collected in the vill, but if the money could not be collected in the vill the hundred was to furnish the amount wanting, the amount to be turned into the king's treasury. This sum was returned in case the murderer was found within a year; if not, then the marks would fall to the king, and the relatives of the murdered man would receive 6 marks. Here follows the provision in regard to aliens.

Si parentes non haberet dominus eius eas haberet, si haberet scilicet fide ligatus cum eo. Si autem neutrum haberet, rex regni, sub cuius dominio et pace degunt omnes albanī, haberet VI marcas cum sina XL 3

In brief, the meaning of the law is this, that in ordinary cases of murder, the hundred is responsible for the fine, if the vill cannot raise the sum the chief part of which goes to the king. When an alien without kin is killed, however, then the king keeps the full amount. These laws probably were compiled by Norman lawyers at the order of Henry I, during a revival of interest in Saxon law and it is not unlikely that some of the provisions were new. There has been some conjecture that the practice was introduced at the time of Canut 4.

1. Careful comparison with other codes will bring out to what extent this is true. 2. Liebermann, 641 § 15 ff. 3. If he has no kin then his lord shall have them, - i.e. the sex marcas; or if he has comrades in fealty to him, they shall have them. If, however, he has neither the king etc. 2. Larson, Canute the Great, 280



but the probabilities seem to indicate that in the germs of an Anglo Saxon custom, William the Conqueror forged a very useful institution to protect his countrymen from maltreatment by the native Anglo-Saxons. 1.

In the same century in which the laws of the Confessor were compiled we have the *Leges Henrici I* which again expressly placed the French and aliens under the protection of the king, with the words 2. '*Omnibus Francigenio et alien igenis debet esse rex pro cognacione et aduocato, si penitus alium non habent.*' 3. This provision certainly was a further strengthening of the status of the French-Norman followers of the king, and to emphasize the fact that violence to a foreigner was a violation of the king's own followers and of the king's peace. What in Anglo Saxon had been a voluntary extension of protection prompted in some measure by the greed of the king and the custom of the land had now under the Norman regime become a matter of necessity and was obligatory upon the aliens, as the word debet would indicate.

But if the theory of responsibility as a municipal institution developed from the protection of the king over aliens at the same time it was to this very source that many of the disabilities of the aliens can be traced. Pollock Maitland 4. bases the commencement of these disabilities at the time of the loss of Normandy, and believes that they continued throughout the middle ages. This is

1. From this system grew the frankpledge of. W.A. Morris' Work on the subject 'The Frankpledge System.' 2. Lieberman, 757, 592  
3. So too 10.3 *Et omnibus ordinatio et alien genis et pauperibus et abiectus debet esse rex pro cognacione et advocato et penitus alium non habent.* 4. Pol. & Maitland, Hist. of English Law I, 461





undoubtedly true, in spite of the fact that beginning with Edward III many concessions were made to alien merchants in an effort to stimulate and protect trade with England. Thus, as on the continent, hosts were appointed for aliens L. and in case of trial where aliens were concerned it was provided that it should be de mediatate lingua 2. It is a noteworthy fact that during this period there was no expressed change in the theory of municipal law responsibility for aliens, but it gradually became strengthened as a. I t is to the continent that we must turn for the radical changes.

We have already traced the theory on the continent through the Frankish period. Following the early constructive period, there was no marked change in the whole law as in England by the introduction of the liability of the hundred, but what changes took place were slow and gradual. In the cities, the chief changes took place, and, indeed, in favor of the alien. Here, the foreigners coming to the local markets were protected by the market peace. Special concessions were likewise made in favor of aliens and they were freed from the dangers of the Rechtsgang by the introduction of the Elendeneid. A special Gastgericht was instituted for their benefit. All of these concessions however, were subsidiary to the fundamental principle of protection of the king. These changes were confined chiefly to Germany, for, in France there grew up again the old identification of alien with hoste an influence perhaps of the Roman law. The long periods of war with England, when every Englishman was an enemy slowly destroyed the international significance of the protection of the king over aliens, and the latter again became identified in the popular mind with enemies, no matter whether they were Englishmen or Germans or Italians.



The predominance of French influence throughout Europe in this period was bound to effect the jurisprudence in other countries, so that even in those states where the Germanic tradition had been preserved the longest the new confounding of alien with enemy gradually crept in and helped to form the basis of the disabilities of aliens, the germs for which had already existed. At the same time as has been mentioned the possibilities of the Teutonic law toward an international significance were destroyed and the whole matter became one treated by municipal law, but without obvious possibilities which had heretofore existed to extend the matter to international law. Nor did the reception of Roman law in the latter fifteenth century produce any immediate effect upon the treatment of aliens. The whole matter although in a chaotic condition from the international point of view, was too firmly established. And in as much as there existed no real international law at this time it was not until the time of Grotius and his epoch-making work, that new developments took place.

In analyzing the theories which were propounded by the early publicists and especially the work of Grotius we must remember that the material upon which they based their structure was essentially Roman in character. It will be remembered that the impulse which the Renaissance had given to the study of Roman law was furthered by reception of this law into the continental jurisprudence. Moreover the publicists and jurists of the sixteenth century were thereby imbued with the spirit of this jurisprudence, and the native feudal law fell into a certain disrepute. It is not astonishing therefore to find that Grotius as the leader in the new international law drew largely from the sources of Roman law, and indeed





chiefly from the private law and the *jus naturel*. 1. But the limits of the present paper do not permit an extended discussion of these matters, so we shall turn to the views of Grotius on responsibility as they were expressed in his De jure Belli ac Pacis.

In brief, the new view which Grotius introduced in regard to the responsibility of the state for aliens was the old private law principle that no one, not even the state was responsible for acts of others, unless there be fault on his part. The element of fault might be caused by complicity, by bad counsel, or various other reasons, and most of all by passivity in the face of some act which was not legal. Thus he says 'a civil community, like any other community, is not bound by the act of an individual member thereof, without some act of its own, or some omission', and 2. he argues on the analogy of the relation of state to state with that of the individual to individual, an analogue which had a great fascination for him. He goes on to say, however, 'but of the ways in which rulers come to share in the crime of others, there are two which are most common, and require diligent consideration: their allowing and their receiving. With regard to allowing, it is to be held that he who knows of the commission of the offense, who can, and is bound to prevent it, and who does not, does himself offend...' 3. And again 4. 'But as we have said, there is required to produce this liability not only knowledge but the power of prevention. And this is what the laws say; that knowing, when it is directed to be punished, is taken for allowing; so that he who

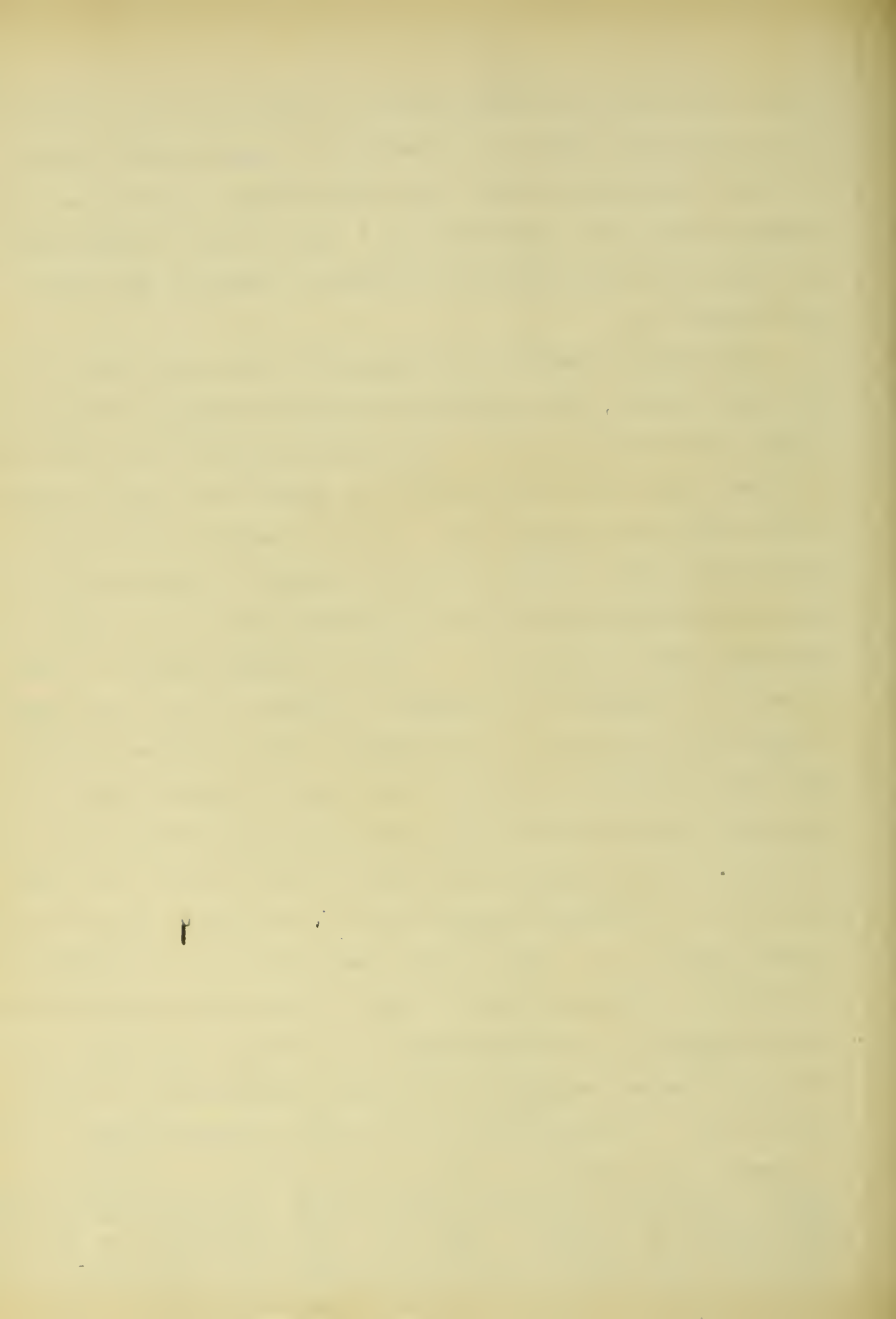
1. Triepel 212 ff. 2. Grotius II, XXI 3. *ibid*, 342 4. *ibid* 343



could have prevented is held bound if he did not do so; and that the knowing here spoken of is cons<sup>id</sup>ered as combined with willing; and that knowledge is taken along with purpose;...for he is blameless who knows, but cannot prevent.' And in still another passage he defines all the acts which constitute offence on the part of the states. 1.

There is a noteworthy fact about the law as laid down by Grotius, and that is, the singularly attenuated character of the principles which he pronounces. This is due perhaps to the fact that Grotius looked upon responsibility in general as a matter regulated by the existing municipal law. It is not easy to conjecture to what extent this was true but in one passage he indicates the fact that he believed the question of responsibility to be a matter of municipal law, for he says. 2. 'Nor if either soldiers or sailors contrary to command do any damage to friends are the kings liable; which has been proven by the testimony both of France and England: that anyone without any fault of his own, is bound by the acts of his agents is not a part of the Law of Nations by which this controversy must be decided, but a part of the civil law; nor that in general, but introduced against sailors and certain others for peculiar reasons.' 3. This latter class was in all probability the foreigners. The passage may be taken as reasonable evidence that Grotius looked upon responsibility as a matter of municipal law and therefore deemed the question relatively unimportant for international law. He little knew that these few statements were to form

1. Grotius, II, XXI § 2 2. *ibid.* XVII § 20 & 21 3. It is to be noted also, says G. further, that the Rule, that if a slave or any animal cause any damage or loss, it creates a liability to the master, is also a creation of civil law. For the master, who is not in fault, is not liable in natural law, as also he is not whose ship although by the laws of many nations, and by ours the damage in such case is commonly divided, on account of the difficulty of etc.





the basis of the views of international law theorists concerning aliens for the next three centuries; for the importance of Grotius influence in this matter cannot be overestimated. Although originally there was perhaps little intention of including aliens, the next great publicists took up these views and with but little change they have persisted up to the present time. The great significance of Grotius theory, however, lies in the fact that with him and the new international law the beginning of the conflicting views of municipal and international jurisdiction are marked and the contest for supremacy was started which seems to have resulted in defeat of those holding to the view of municipal jurisdiction. But we are anticipating, and we return to the early publicists and shall see what was accomplished by them, keeping in mind the fact that the bases were being laid for the controversies of the nineteenth century.

It is Zouch<sup>o</sup> the next great publicist after Grotius in his work "Juris et Judicii Fecialis sive Juris inter Gentes etc. 1. <sup>"</sup> quotes Grotius and gives voice to the same principle namely that there is no responsibility except for fault of the state itself. Similarly Puffendorf 2. in his De Jure Natural et Gentium depends on Grotius for his views in the matter of responsibility for he says 3. that the courts of law may punish on occasions certain persons in consequence of a crime which has been committed by others. Thus, for instance, if persons are in any way accomplices to a crime

1. Zouch, II sec. 5, § 1 p. 106 2. Puffendorf, 1497 3. ibid. VII, 497; VIII, Chap. III, § 28; chap. VI, § 12, p. 503



they may be punished accordingly. If a community however is guilty of some corporate body, it is to be regarded as an entity and punished accordingly although sometimes single members alone may be punished. 1. This statement seems to indicate that the matter of responsibility was being looked upon more as a matter of international law, although the same limitations on the matter which Grotius placed upon it still held good. Thus in still another passage Pufendorf says: 'Au reste dans l'indépendance de l'Etat de Nature, on ne peut venir à la Guerre contre personne que pour les injures qu'il a lui-même commises. Mais, pour ce qui est des Sociétés Civiles, lors que Quel<sup>l</sup> l'un des Citoyens a fait du mal de son pur mouvement à un Etranger, ou s'en prend quelquefois à tout le loys de l'Etat ou à celui que est le chef; et voici en quel cas cette imputation a lieu. Il est certain, qu' aucune communauté n'est tenue du fait des Particuliers, dont elle est composée, qu' autant qu'elle a comme au néglige elle-même quelque chose qui influe sur l'action dont on la rend responsable car quelque soit que soient les menaces des Loix & du Souverain, elle laissent toujours aux Sujets la Faculté Naturelle de contrevenir à leurs ordres. Or, il y a deux raisons principales, pour lesquelles on peut déclarer la Guerre à un Souverain pour tirer satisfaction des injures que l'on a reçues de quelcun de ses sujets tant nouveaux venus, que naturels du Pais. L'un c'est parce qu'il a souffert que l'on fit tort à l'Etranger: l'autre, parce qu'il donne retraite à l'Offenseur. Le premier fournit juste cause à Guerre, presque le Prince Souverain accint connaissance du crime, & pouvant l'empêcher, sans avoir à craindre de s'attirer par là un mal plus fâcheux, ne l'a pas fait néanmoins. 2.

1. If vote is taken those against action are guiltless 2. Pufendorf, VIII, c. VI § 12, P 563





This quotation illustrates how the passages from Grotius which we have already noted were taken early in the history of the new international law to apply to aliens and there can be little doubt but that Pufendorf was the first to apply the general theory. Close in his footsteps followed Vattel, whose views in this matter although practically built on the writings of the preceding publicists are the ones which are generally supposed to have formed the basis of the practice in the early 19th. century, if frequent quotation may be taken as a criterion.

According to Vattel, the cases in which a state would be responsible for injuries to aliens were of practically the sort enumerated by preceding writers, although Vattel is even more explicit

in applying the Grotian view of responsibility to cases involving aliens' rights. 1. In the first place Vattel asserts that if a sovereign does not prevent injury to a foreigner by his subjects, he is no less guilty than if he has committed the act himself, but as it is patently impossible even in the best regulated states for the sovereign to have absolute control over his subjects, it would be unjust to impute to the state every delict committed by the citizens thereof. Consequently injury by subjects of a state does not necessarily mean an offence on the part of the state itself. As it stands, this principle is doubtlessly true, but too often it has been used to form the basis upon which the advocates of non-responsibility of states have argued against the assumption of liability for injuries sustained by aliens. Thus Calvo and many others have used these arguments of Vattel to excess, accepting as a fundamental truth matters which can be looked upon as only partly true. But', continues Vattel', 'if a nation or its chief approves





and ratifies the act of the individual then it becomes a public concern; and the injured party is to consider the nation as the real author of the injury, of which the citizen was perhaps only the instrument.' In other words responsibility of the state proceeds only where there is delict on the part of the state.

As regards the matter of indemnity, Vattel does not regard the injury to aliens as a matter giving rise to public payment but he believes that the state should compel the transgressor to give compensation or to inflict punishment on him or to deliver him to the offended state, a view which indicates that Vattel made no distinction between satisfaction and compensation as results of responsibility. 1. We shall come presently to the law in Spain, where we shall find that the principle of indemnity to injured aliens in the penal code of that country rests upon an identical basis, namely that the transgressor is liable to payment of compensation, with the state acting simply in the capacity of an agent. So too in the law in the United States.

It is when the sovereign refuses to cause reparation to be made that it becomes responsible, 'but if he delivers up either the property of the offender as an indemnification, in cases that will admit of pecuniary compensation or his person, in order that he may suffer the punishment due his crime, the offended party has no further demand on him.' 2.

There is one other case in which a nation is responsible, namely when it authorizes its citizens to plunder and to maltreat foreigners. But this is a matter too far removed from present day practice to require discussion.



Such in brief are the various views which determined the course of international law for a considerable period of time. As we have already indicated the successors of Grotius all based their opinions upon those expressions in the *De Jure Belli ac Pacis* and are nothing more than an attenuated development therefrom,. This was necessarily so, in view of the fact that Grotius had already declared the matter to be one of civil i.e. the municipal law, and accordingly all that was left to be done was to expand and revise these early views as seemed commendable. But here the theories of the early publicists were of vastly greater significance than the mere printed words. While the question of responsibility yet remained a matter of practically exclusive municipal control, the views of Grotius and his successors furnished an excellent weapon in the hands of claimant states, and it was through them, and not through the respondent governments that the weight of precedent finally turned the balance in favor of international law in the practice of responsibility. This was largely due to the dual role which the states were wont to assume in matters of this sort. Thus, if a state was called upon to acknowledge its responsibility for the maltreatment of an alien by some brutal mob it would reply, 'No, this nation is not responsible in international law, for the question of responsibility is something which from time immemorial has been regulated by the internal law of the land. If the injured parties want redress, they must apply to the local courts.' If reference was made to the rule in Grotius, the government simply need prove that there was no fault of its own. On the other hand should this same state have claims of a similar nature against another state it is very likely that the principles of Grotius and





Vattel would be pushed to the extreme, and in this way, the theory of international responsibility was developed.

While the bases were being laid during this period for the struggle in the nineteenth century between the municipal law champions and those favoring international law, the developments in municipal law were not quiescent, so before we take up the views of the later publicists and the exact nature of the theory of responsibility, let us examine the development of the municipal law in the various European countries, turning first to France. In this country as in other of the European states the regulation of the matter of responsibility is still done by municipal law, although the applicability of this law to aliens has through the growth of international practice quite lost its pertinence.

The exact relation between legal theorizing and practical political life has been a much debated question and a satisfactory solution has never been advanced for the problems which arise from attempts to reconcile theory and practice.

The present law relating to communal responsibility has its foundations in the celebrated law of the 10 vendemiaire of the year IV. This law, which we shall examine presently was drawn up at the time when the revolution was at its height and insurrections and disorders of all kinds were of frequent occurrence. The law may be considered as the statutory expression of certain ideas which had found great favor with the Constituent Assembly. 1. and which evidently bore an intimate relation to the existing theories of responsibility. These ideas of communal responsibility were based



on the old argument that upon every citizen rested a legal obligation to maintain order and should this obligation fail to be carried out, the body of citizens would be responsible for the disorders which they had failed to prevent. 1.

It is undeniably true that a great similarity exists between this theory and the early feudal theory of responsibility. This was the inevitable result of the theorizing of the publicists who had left matters of responsibility to municipal law. It is certain that the leaders on the other hand of the Constituent Assembly were acquainted with these views. It may be said of the theories of the constituent assembly that they were also a part of the movement to give the bulk of the population political liberty and a share of responsibility in the welfare of the state. Moreover, the law of the tenth vendemiaire was the result more of external pressure than of political theorizing.

On the whole, 2. the law provides that the communes are responsible for injuries caused by riots and mobs. They are not however responsible for the culpa of communal authorities -Grotius again!- but for the acts of the inhabitants themselves. The statutes provide equally for injuries to aliens and injuries sustained by nationals. In the event, however, of riots being caused by strangers in the commune, it is free from all responsibility. The responsibility when incurred, is not only civil, but penal. In other words, it means that not only must an indemnity be paid, but also a fine to the government of the Republic. The ordinary courts were given jurisdiction in these cases.

1. In short this means that if the majority of citizens were guilty of rioting would be responsible and if not guilty would be responsible for not having restrained the other citizens. 2. Calvo, III, 148 ff.





Such in outline were the main provisions of the law of the tenth vendemiaire. The statute had an important influence not only upon the existing conditions in France, but also upon the subsequent development of the theory which found expression in the judicial decisions of succeeding years, and finally in the celebrated law of the fifth of April 1884.

With the passing of the revolution and the advent of a more peaceful social order with its strongly centralized government, a feeling arose and gained foothold that the principle of communal responsibility was incompatible with present jurisprudence, and that the responsibility of the communal authorities should supercede that of the inhabitants of the commune, a condition affected perhaps by the development of international law.

Judicial recognition of this change was given for the first time in a decision rendered by the Court of Cassation shortly after the July Revolution of 1830. 1. The court held that the law of the 10 vendemiaire was too local in character to be applied to a city of the size of Paris and that furthermore the municipality of Paris did not have at its disposition sufficient police or armed forces to warrant the enforcement of the law.

However close in accord this decision may have been with the existing views in regard to communal responsibility, the judgment was manifestly a violation of the spirit and purpose of the law of the 10 vendemiaire, for one of the chief reasons for the enactment of the law had been to assure the maintenance of order in Paris itself. In subsequent years, when Paris was again and again the seat of insurrection special laws had to be enacted to provide indemnification for the losses sustained.



The next great change in the theory of communal responsibility came in the year 1884 with the new law of municipal organization of April 5th. This law forms the basis for the present practice in France and it may be worth while to quote the provisions in full. 1.

Art. 106 The communes are civilly responsible for damages and injuries resulting from crimes or misdemeanors committed with open force or violence on their territory by mobs, armed or unarmed assemblages either against persons or against public or private property.

The damages for which a commune is responsible shall be divided among all the inhabitants of the said commune in accordance with a special list comprising the four direct taxes.

Art 107 If the mobs or riotous assemblages be formed by the inhabitants of several communes, each of them is responsible for the losses or injuries caused, in the proportion to be fixed by the courts.

Art. 108 The provisions of articles 106 and 107 shall not be applicable:

1. When the commune is able to prove that all the measures which were in its power were taken in order to prevent the mobs and riotous assemblages and to apprehend the perpetrators,

2. When the commune or the municipality did not have at its disposition the local police or an armed force.

3. When the injuries caused were the result of an act of war.

Art. 109. The commune which is declared to be responsible may have recourse against the perpetrators or accomplices of the disturbance.

Compared with the law of the 10 vendémiaire this statute is singularly restricted in form and content. What it really accomplishes is to bring about a sort of mutual safety insurance and gives to the maire a great power in suppressing revolts. This duty naturally falls upon him as the head of the police. 2.

To the casual observer it would perhaps seem that France had in her system of communal responsibility an excellent means of including cases of injuries to aliens, but if she has she has not been able to make the best of it. What has really happened is that whenever France has attempted to invoke this means of escaping in-





ternational liability, that she has failed and so finally has had to admit the principle of international responsibility as we shall see in the next chapter, this change of attitude has come about since the year 1870 and in one of the important recent cases, the Aigues Mortes affair where she had a splendid opportunity to invoke the doctrine of municipal law it was not even mentioned. At present, it would seem that the issue is definitely decided in France in favor of the theory of international responsibility, but this matter will be better illustrated by the study of French practice in the succeeding chapters where the cases cited will enable us to draw more accurate conclusions.

But the theory of communal responsibility did not flourish in France alone, it also was and is an integral part of jurisprudence in Germany. Old laws flourished in Brunswick and Bavaria but the medieval views seem to have been superseded. It is to Prussia that we turn to find the most significant development. In Prussia the law was not introduced until 1850, and it can hardly be said to have been based on the old German law. It was a law which was actuated by the outbreaks in 1848-9 and was a clear adaptation on the French model to German needs. It was passed March 11, 1850 and, in brief, provides that the Gemeinde is responsible for injuries caused by riots within its jurisdiction, unless such riots were caused by mobs which were formed elsewhere and which entered the municipality by force. Indemnity devolves in such cases upon the municipality where such riotous assemblages originated even when the municipality was clearly not in a position to prevent such riots. If there are a number of Gemeinden they are collectively

1. Calvo III, 154; Boeuf, VIII    2. Triepel 375



responsible. A later decision of the Reichsgericht held that the municipality was responsible for injuries or damages incident to the suppression of riots, even in cases of forcible entrance by the police in discharge of their duties. 1.

The Gallic character of the act is apparent from the above, but in practice the Prussian legislation has differed from the French, for as far as we have been able to ascertain no attempt has been made to apply the law to injuries sustained by aliens under the circumstances provided for, nor indeed has there been any occasion to do so. The Prussian law was clearly preventive measure which was enacted to avoid the recurrence of such excesses as had taken place in the two preceding years. It is significant however that when in 1896 the Bürgerliches Gesetzbuch was revised this law was not in any way altered, but still remains an integral part of the statutes in force.

Turning to Spain, we find that the matter of responsibility is not regulated by the civil law, but is a question which is left to the penal law. Thus articles 120 and 230 of the penal code provide for an individual criminal responsibility of the transgression as contrasted with the communal responsibility in other European states. The property and goods of the instigators and abettors of the insurrection may be seized and sold, and the money thus obtained may be used to indemnify the victims. 2 The chief objection to the provision aside from the fact that it is contrary to international law, is that in most cases the insurrectos are of the poorer classes, and have no property to confiscate. This was especially true of the Barcelona riots of 1909

1. Gesetzbuch des kgl. Pr. Reichs, 1850, p. 164, also Handbuch der Preuss. Verwaltung, I, 135 2. Jour. Privé 1140





The law is very unsatisfactory from this point of view. As regards the international significance of the provisions however in this respect they have been of greater importance than the Prussian statute. In every case where claims of her responsibility for injuries sustained by aliens in her numerous revolutions have arisen Spain has sought to entrench herself behind these provisions, but her efforts have usually been futile. Successively in 1830, 1842, 1868, 1893 <sup>1</sup>. she has been obliged to pass special laws to meet the exigencies of the moment, for even in the case of France where a well developed system of municipal responsibility existed, when claims were being pressed by her against Spain, she refused absolutely to recognize the principles which Spain contended for.

We have been unable to ascertain the antiquity of these provisions, but if they date before the first quarter of the nineteenth century it is possible that the law of Spain may have been the foundation of the very widespread development of theories of municipal responsibility in South America, in as much as the Spanish law was bodily transferred to these countries during the period that they were under Spanish dominion. But this, as we have indicated is a mere conjecture which would indeed be difficult to substantiate. The South American jurisprudence we shall discuss in connection with our study of those countries.

We turn next to England, where we have seen that from the law and custom of the early AngloSaxons there grew up the institution of the responsibility of the hundred. Until the time of Edward I these matters were probably regulated only by the various existing laws and customs of the realm, but by the second statute of



Winchester of Edward I of the year 1285, the existing law was consolidated under one statute **1.** which was especially designed to protect foreigners more particularly foreign merchants from injuries at the hands of 'robbers and felons'. Thus the hue and cry is to be made in the countries and hundreds etc. after such transgressors. 'Likewise, when need requires, inquests shall be made in towns by him that is Lord of the Town and after in the Hundred and in the Franchise and in the county and sometime in two, three or four counties, in case where felonies shall be committed in the marches of the shires, so that the offenders may be attainted.

And if the county will not answer for the bodies of such manner of offenders, the pain shall be such that every twenty, that is to wit, the people dwelling in the county, shall be answerable for the robberies done, and also the damages . so that the whole Hundred where the robbery shall be done, with the franchise being within the precinct of the same hundred, shall be answerable for the robberies done . and if the robberies be done in the division of two hundreds, both the hundreds and the franchises within them shall be answerable.' Forty days is allowed the county to answer for the offence. **2.**

This same statute was reenacted with revisions and amendments in the year 1354 of the reign of Edward III, **3.** due to the increase of merchants. One important feature of this new statute which does not appear in the previous law, is the fact that the importance of the aliens in the trade of the realm is recognized,

**1.** 13 Edw. I Stat. 2, chap. 1 & 2      **2.** ibid. c 2      **3.** 28 Edw. III c 9





and it is expressly stated that the act provides for the 'surety and indemnity' of the same. In its main provisions the law is identical with the preceding one.

These statutes served as the basis for the responsibility of the hundred until the reign of Elizabeth, although the general matter of riots was the subject of considerable legislation during the subsequent years. 1. In 1585 new provisions were enacted 2. due to the fact as the law states that the conditions of the old law were too difficult to fulfill without greater cooperation on the part of other hundreds and counties. The fact, too, that the injured party, being fully indemnified under the terms of the law was not anxious to prosecute also needed some amendment. In the first place, the law provided 'that the inhabitants of every or any such hundred - with the franchises within the precinct thereof wherein negligence, fault or defect of pursuit and fresh suit after the end of this present session of parliament, shall answer and satisfy the one moiety or half of all and every such sum and sums of money and damages as shall by force or virtue of the said statutes or either of them be recovered or had against or of the said hundred with the franchises therein, in which any robbery or felony shall at any time hereafter be committed or done...' 2. This amount could be recovered by an act of debt, bill, plaint or information in any court of record at Westminster in name of the local clerks of the peace for the time being. Furthermore the law provided that although the hundred was charged with paying the damages yet no definite means of meeting such damages had been provided for, and accordingly a system of special assessments was



introduced to furnish indemnity, this assessment to be made in every hundred where there had been default or negligence. If, however, the offender were apprehended there was no penalty.

A slight change was made in the law during the reign of Charles II, when it was provided **1.** that the hundred was not responsible to persons travelling on the Lords day who might be robbed and that such persons were to be barred from bringing any action for the said robbery. The hundred might however make or cause to be made fresh suit and pursuit after the offenders upon pain of forfeiting to the crown as much money as might have been recovered by the injured party against the crown.

The extension of responsibility to the hundreds directly over cases of riots was first accomplished by statute in the reign of George I **2.** In brief this act made the hundred responsible for the destruction of houses, barns, stables or buildings of religious worship by riotous assemblages. Action was to be brought in any court of record at Westminster against any two or more inhabitants of the hundred, and damages were to be recovered in the same manner as provided for in the act of Elizabeth. This statute was really an extension of the law of William and Mary **3.** where all damage done to places of religious worship by mobs or riotous assemblages was to be regarded as a felony without benefit of clergy and the penalty was death as in cases of felony without benefit of clergy.

The statute of George first was further extended in 1722 to include various other offences committed by mobs, such as the

**1.** 29 Chas. II, c 7 § 5    **2.** 1 Geo I stat 2 c 5 § VI  
**3.** W. & M. sess. I, c 18





killing of live stock, destroying of trees setting fire to buildings and other offences of a similar nature. 1. This statutory provision was reenacted in 1856 during the reign of George II 2. Further liability for the hundred was provided in 1735 by a statute which added the damages for destruction to fences and gates and kindred matter to the existing list. 3. Other additions to the matters for which the hundred could be held responsible were made in the reign of George II in order to make the list of subjects as explicit as possible. 4. Amendments were also made to the law in the reign of George III. 5.

The various amendments and revisions of the laws of hundred responsibility which all had their basis in the law of Elizabeth, left the state of legislation at the beginning of the nineteenth century in a most chaotic condition, but it was not until the year 1827, during the reign of George IV, that measures were taken relating to the responsibility of the hundred. In brief, the new law provided that the hundred was responsible for damage done by rioters in the various cases which have already been mentioned, and that it should make reparation therefore. The general mode of legal procedure was provided for the method of raising the money necessary for indemnification. Cities, towns or places not within any hundred or which did not contribute to any county rate were to be liable in all respects in the same manner as the inhabitants of the hundred. The money for indemnity was to be raised over and above the usual rate and in the same manner as such rate.

This act provided for the practice which was followed until 1886 when the new riot act was passed. It is significant for our study that the responsibility of the hundred had in the course of  
 1. 9 Geo I c 22 § VII 2. 29 Geo. II c 36 § 9 3. 8 Geo II c 20 § 6  
 4. Hus 10 Geo II c 32 § 4 11 Geo II c 22 § 5 19 Geo II c 34 § 6  
 5. 9 Geo III c 29



study that the responsibility of the hundred had in the course of its development completely divorced itself from the fundamental concept of responsibility for injuries to aliens within the limits of its jurisdiction, from which the whole matter had originated. Although as we have seen the change in the theory came gradually through the seventeenth and eighteenth century the actual change in the law did not come until the passage of the act of George IV for the act of Elizabeth continued in force until this time. It is during the early Georgian period that the two classes of regulations heretofore distinct combined: the acts regulating riots and those regulating responsibility. The complete fusion occurred in the act of George IV

Two slight amendments were made in the subsequent years to the act of George IV. In 1832 the responsibility was extended for damages done to threshing machines. 1. In 1854 in the Merchant Shipping Act it was provided that the hundred was responsible for damages done by plundering of shipwrecked vessels by riotous assemblages. But the responsibility of the hundred for riots was to undergo a still more radical change.

In 1886 in consequence of a riot in London a new statute known as the Riot - damages- Act was enacted by which the old responsibility of the hundred was completely done away with. 2. The law provided 3. that: 'Where a house, shop or building 4. in any police district has been injured or destroyed, or the property therein has been injured, stolen or destroyed by persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing or 1. 2,3 Will. IV c 72 2. 17, 18 Vic. c 104 § 477 3.49, 50 Vic. c 38 4. ibid. § 2 5.





destruction; but in fixing the amount of such compensation, regard shall be had to the conduct of such persons. ...' Insurance was to be deducted from the amount of compensation, claims of which were to be made to the police authority of the district. The amount once determined, the expenses were to be raised as part of the police rate; part of the local expenditure of the district. Where borough and county forces had consolidated the costs were to be divided between the two in such proportions as the police authorities should determine. The act also included the provision made in 2 & 3 Will. 4 c 72 and section 477 of the Merchant Shipping Act.

The act is the basis of present practice in England. In virtue of its provisions the last vestiges of the old Anglo-Saxon responsibility of the hundred were swept away and the new method of responsibility was introduced. Moreover like the act of George IV the question of the liability for injuries to aliens is completely extinguished. This is not surprising for during the whole nineteenth century no claims of Great Britain's responsibility for injuries to aliens within the limits of England were made. In consequence thereof, it was natural that a custom which at one time took the place of an international law gradually should lose its significance as an international matter, and become essentially a municipal matter. It is safe to say that if the states who attempt to regulate the matters of responsibility by their municipal law should observe the degree of impartiality in the administration of justice which the British courts exercise, the question of responsibility would have passed out of the realm of municipal law except, perhaps in cases of exceptional international significance. England has abandoned the question of the jurisprudence of injuries to aliens



not as a result of international pressure, but because there was no need to exercise such powers.

That the custom of responsibility of the hundred has been of importance without the spheres of British jurisprudence, there can be little doubt. There is more than a bare possibility that the British jurisprudence has influenced the American law in this matter, in spite of the fact that the opportunities of showing an intimate historical connection are few.

During colonial times in New York 1., Pennsylvania 2., Massachusetts 3. and Virginia 4. riot acts were passed which were in the first three states closely patterned after the acts of George II. None of these acts however contain stipulations providing for the responsibility of any political divisions analagous to the hundred for damages resulting from mob violence, but with exception of these few laws, entirely without relation to the matter of liability there is not legislation to be found until the middle of the nineteenth when various local influences brought about the enactment of statutes which formed the beginning of this type of legislation and which were the acts upon which at present the responsibility of counties and municipalities for riots is based. Thus for example in New York the first statute was enacted in 1855 and probably was a measure directed against the spread of the excesses of the so-called rowdies, whereas in California there were early statutes in 1867-8 and were very likely motivated by the difficulties in maintaining order and security. This sort of legislation appears to have been earliest, however, in Maryland, when in 1835 the first statute of the sort was passed. In Massa-

1. Col. Laws of N.Y. V 646 2. Stat. at large of Pa. VI 325 3. Mass. Acts & Resolves III 544 ff. 4. Hening II, 352





chusetts the beginning was made in 1839 and in Pennsylvania the first statute bears the date of the year 1841. The New Jersey law goes back as far as the year 1864 and the statute in Kansas was passed in 1868. All of these statutes have been revised and reenacted but the present legislation is all of comparatively recent date. We shall briefly consider the existing statutes.

It is true of practically all the present laws relating to the responsibility of the counties or cities for injuries or damages resulting from mob violence, that in the main they differ but little from each other. Moreover it is interesting to note that in every case these laws have been upheld by the courts as being constitutional. In California the statute provides that every county or municipal corporation is responsible for injury to real or personal property by mobs or riots. 1. In Kansas however we have a similar provision but injury to life or limb is likewise included, a matter which in itself seems just. The same provisions as in the California statute are to be found in the Kentucky statutes. Moreover, the liability of the county or municipal corporation is only to be claimed when it can be shown that they had the ability to prevent such riots. 2.

In Illinois a law regulating the matter of local responsibility was passed in 1805 which provided that whenever any building or other real or personal property, except property in transit, shall be destroyed in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city then the county in which such property was destroyed shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three fourths of the damages sustained by reason thereof. 1. Deering 1396;4452 2. Gen. Stat. of Kansas, 1909 § 2933





of' 1. It is especially stipulated that this provision would not prevent the injured party from suing the persons participating in the mob. 2. The city or county which pays indemnity may recover such amounts from any or all persons engaged in the riot. In cases of lynching, the lineal heirs of the victim may recover damages from the county or city not exceeding 5,000.

The law in Maine 3. provides in a similar manner for both an individual liability for damages by rioters and a liability of the town when injury exceeds the sum of 50. The same provision for 3/4 value indemnification is also present. The Massachusetts statute also has the three fourths rule and provides that the town shall be liable in action of tort as may the offender. 4. There are other slight deviations in other states. Thus in Maryland there is a due diligence clause which stipulates that no indemnity shall be forthcoming when it can be proven that the city or county has used due diligence in attempting to suppress the riot. 5. Different is the Missouri law where liability of individuals and of cities of the first or second class is established. The city may recover such amounts as it paid out as indemnity from the individuals engaged in the riot, plus 10 per cent and the added interests and costs. 6.

Turning again to the eastern states we find that in New Jersey the law has the same general features as the California law 7.

1. Rev. Stat. of Ill. 1911, 807 § 256b 2. *ibid.* Maine 1904 929  
 3. This is a pretty general rule in our law. 4. Mass Rev Laws 1902 II 1784 sec 8 5. The Annotated code of Pub. Civ. Laws of My 1911, p. 1902 6. Rev. Stat. of Missouri. 1909, II, 3005 § 9549 ff.  
 7. Compiled Stat of N.J. 1911, IB p. 4381



but in New York **1.** where the law is in the main identical, action may be brought against an official, if he has not used due diligence in suppressing the riot. In Pennsylvania **2.** a special law for Philadelphia regulates the matter **7.**

It might seem perhaps that this discussion of municipal law in the United States has led us away from the main points of our discussion, but the role which the municipal law may play in the question of jurisdiction in a federally organized state is too important to be overlooked and will unfold itself presently in connection with our discussion of the cases arising in the United States. As a possible outgrowth of the responsibility of the injured it is interesting too for it preserves the tradition of the hundred better than does the present law in England, and although it is not vastly different therefrom it may be compared with the putative relation between the law of the South American states, and that of Spain. As regards the significance which the law has or may have upon the practice of responsibility for aliens this is only to be conjectured, for as has been remarked the existing legislation is of comparatively recent date, and where such laws existed before, no cases of responsibility have arisen. In spite of the obviously potential character of this legislation therefore it is not to be supposed that it will supercede the existing practices of international law which the United States has observed such against her will, but like the system in England, and the communal responsibility in France will form an excellent means of internal policing but a matter not at all related with international law, except in so far as the injured aliens may themselves wish to submit to the decision of such tribunals. But as we have said **1.** Consol. Laws of N.Y., II, 213 § 71 **2.** Dig. of Stat. Law of Pa 1910, IV, 4158 **3.** In Utah action must begin within a year.





subsequent developments will show exactly what international significance these laws will have.

This completes our study of the growth in the municipal law as regards responsibility except for the legislation in the South American states. But what the actual effect of the laws has been and the close interrelation of the same with international jurisprudence we can only ascertain by the study of international practice, a matter with which subsequent chapters shall deal. We have already indicated at various times that the relation of municipal law to international practice is gradually losing its significance and instead of paralleling or overriding the international law it is gradually sinking to the type of law which is known as supplementary municipal law, as for instance the municipal law needed to carry out treaties. This situation has been created in Europe chiefly by the delicacy of the international relations there, where the states would rather submit to acknowledging their responsibility than to disturb amicable relations. This has been especially true during the last quarter of a century. On the other side of the Atlantic, however, where lines are not so finely drawn, the states have gone at greater lengths to assert their independence but even here the development has followed the lines of that in Europe and it seems truly just that this should be so, for if a state has not reached a degree of civilization to prevent the reoccurrence of outrages upon aliens within its confines then no great impartiality in the administration of municipal law is to be expected there. This has been the case and it yet remains for us to show whether the force of international practice may have been sufficient to have completely superseded the municipal jurisprudence.



We have tried to indicate in this chapter the various phases of development through which the theory of responsibility of states for aliens has undergone from earliest times until the present. At the basis of this development there are certain fundamental concepts which explain in some degree the reasons for the wide difference of opinion in regard to responsibility. These theories we must ascertain before we can fully understand the significance of international practice.



## Chapter II.

## THE NATURE OF RESPONSIBILITY AND ITS RELATION TO THE PRESENT PROBLEM.

In the last chapter we traced the legal expression of the theory of responsibility of states for aliens from the earliest times down to the beginning of the twentieth century, noting first the dual character of the jurisprudence, the loss of its international significance, the new lines of demarcation which Grotius drew, and finally the conflict of laws and jurisdiction which took place in the nineteenth century. The present chapter will deal with what the theory is in and per se and what its present status is.

In the first place we insist that the character of responsibility, in the problems which we are discussing, is fundamentally one of public law. Attempts to regard the matters of responsibility as purely within the field of private law are unjustifiable and this we shall endeavor to point out in the succeeding discussion. The responsibility of a state for injuries sustained by aliens never assumes a real character of private law, altho at times it is difficult to distinguish the private from the public law aspects. It is true that very frequently matters which might give rise to international responsibility are settled by the application of private law rules, but in such cases there never existed an actual responsibility in international law, although the potentialities for such were present. Hence, we may say, that international responsibility presupposes a public law treatment.

When we speak of responsibility in its international connotation, we immediately assume that there has been an act in violation





of some norm of international law, for it is only from such a violation that international responsibility can arise. Of equal importance to the concept of an infraction of a given rule is the question, to whom and by whom in international law is responsibility imputable? We know that international law is regarded as the totality of rules or principles which governs the mutual relations between civilized states and according to which principles such states regulate their rules of conduct; and, furthermore, that international law imposes upon the states certain obligations as well as rights. In short, international law is a relation between states, and the individual, in so far as his interests are concerned, is only the object of the rights and duties of such states. Thus, if a state permits a flagrant outrage upon a subject of another state whom it is bound by international law to protect in life and property, it has violated a rule of international law for which its responsibility may be engaged, not to the individual, but to the state of which the individual is a subject.

We have indicated that it is an international obligation of a state to accord to the subjects of another state certain rights and privileges. The granting of these rights and privileges has given necessity for laws within a state which complement the general international law and which prescribe the mutual conduct of aliens and nationals. Thus, there grows up a double form of responsibility, the international responsibility and the responsibility which a state owes by its own law and jurisprudence. The former is the relation between states the latter between state and individual. It is only when the local laws are completely at variance with international jurisprudence and the conflicts of law arise, when



the municipal law attempts to take precedence over the international law, that such municipal law will affect the problems which we are studying. But before we go more intimately into the various cases in which the international responsibility of a state is engaged, let us enquire more precisely into the question of what constitutes such responsibility.

We saw that responsibility in the general international legal sense, proceeds from a violation of some rule of international law. It presupposes three conditions: first, an illegal act in international law; second, a relation between the positive act and a determinate subject; third, an injury resulting from said illegal act.

The illegal act which gives rise to responsibility presupposes in turn, the material act of transgression and the norm which such an act violated. The latter, if it is to give rise international responsibility must be a rule of international law. The act itself may be either a positive act on the part of the state, or an omission, a failure to carry out its international duty; but in either case responsibility will exist just the same. The positive act may occur by direct act of the state, or by some agent of the latter for which it would be responsible. Again if the state neglects to enact the necessary laws for the execution of international law, it is guilty of an omission, which in its effect does not differ from a positive act of the states. But the responsibility of the state is not engaged for all such acts or omissions occurring within its jurisdictional limits. What these particular acts are and the circumstances in which they may arise, we shall presently ascertain.

① From the obligation of responsibility proceeds the duty of

① [ Read this after next paragraph ]





reparation. It may be either a duty of satisfaction or a duty of compensation. The former consists usually in an apology or a salute to the flag of the injured party, or the salutary punishment of offenders, or some similar act. Compensation, on the other hand is always a money payment, in theory, to the injured state, not to the individual; but in practice either method may be followed.

Whatever form, however, the obligation of reparation may take itself, it is always the form in which the assumption of responsibility expresses itself. Thus it can exist only when responsibility has been acknowledged, altho the making of reparation may be regarded as prima facie evidence, that responsibility has been acknowledged. Thus, when we find publicists saying, "aliens are entitled to receive indemnity when so and so occurs", they are falling into the old error of mistaking **cause** for effect. They are discussing a matter in private law as though it were in public law, for the payment of indemnity to the injured individuals is res interna, that is, it is a matter which the parent state regulates with its subjects as it sees fit. It cannot be regarded as within the sphere of public law. This distinction of reparation and responsibility is a most important one to our discussion, and keeping it in mind, we shall be able to maintain the distinction between the public and private law aspects of the whole problem of responsibility.」

The injury resulting from the illegal act consists in the illegal character of the act rather than in the result of the act itself, due to the peculiar nature of international law, the fact that its force is potential rather than positive, and, again, from the fact that the injury is usually more a moral injury than a



material injury. In itself the injury may be a twofold violation of right. It may be a violation of a right so <sup>that it is</sup> ~~as to be~~ an act contrary to objective international law, and then it becomes cognizable in the municipal courts of the country, where the act was committed, but, on the other hand it may be a violation of a right which makes it a matter of subjective international law, and no longer of municipal jurisdiction, but a matter between the states concerned. It is even more distinctly in the confusion of these two fields of jurisdiction than in the fields of law mentioned above, where the clash has come between municipal law on the one hand and international law on the other. States have thought that in satisfying the injury subject to their own law, in this manner, that the other injury, namely the violation of international law has been fully repaired, but this is, of course, impossible.

Keeping in mind these points in regard to the general nature of responsibility we may now turn to the theory regarding the especial responsibility of the state for aliens injured in mob violence and other civil commotions, and the question of the protection the state is bound to accord them.

It has already been stated that one of the obligations which international law imposes upon a state is the recognition of certain rights and privileges to aliens. If a state fails to do this, such a failure to perform its duty may constitute a violation of international law for which its responsibility may be engaged. Exactly what the nature of these are is also of importance. The rights which aliens enjoy, exclusive of those granted by treaty stipulations, are in general to be divided into two classes: first, absolute rights, and second, personal rights. The former are matters





regulated by international law and the latter, matters of municipal law. Strictly speaking, international law imposes on a state simply the duty of protecting the life and property of an aliens. These are the absolute rights of aliens. The personal rights of aliens as they are regulated by the state in which the former are residing may be discriminatory against the alien, but as a rule, it is held that these rights should be no more and no less than those of the nationals themselves. In spite of the fact that this is the strict legal status of aliens, it appears that there is a certain absolute standard for the treatment of aliens which has grown up thru long years of international practice. This standard has never been formally recognized, but it works as a great force in the shaping of international opinion and gives strength or weakens the rules among states, as they either give or take rights from aliens. 1.

In contradistinction to the matter of granting rights to aliens which as a duty of one state to another may be regarded to a certain extent as a surrender of sovereignty, we find the right of protection which a state has over its subjects abroad, a matter which may be regarded as a manifestation of sovereignty, for the protection of such subjects, is in international law the protection of the interests of the state. The protection of the state over aliens is not to be looked upon merely as a right to be exercised at the whim of the parent state, but a duty as well, 2. which is exercised under certain limitations, namely, those cases where municipal law alone should have jurisdiction. Pradier-Fodère 3. mentions certain instances in which protection is due from a state for its nationals

1. Thus the extra-territorial courts.

2. Pradier-Fodère, III p. 230.

3. Ibid, p. 231.





abroad, 1. Against acts which violate international law. 2. Against arbitrary procedure or denial of justice by local authorities. 3. Against manifest injustice about to be committed against nationals, in violating the existing order of things, or in introducing odious distinctions. 4. In private suits between aliens and nationals which engage the general interests. 5. Against the violation of the provisions of treaties or conventions between the two countries. 6. Against the irregular exercise of right by local authority.

The right of protection depends in some measure upon the intimacy of the relations existing between state and the subject, for it is the nationality of the subject which permits a state to demand from another state a certain line of conduct to be observed in regard to such subject. Here again the question of the relation of the individual to international law is raised. In one case he being the object of the right of protection, and in another the subject of the internal laws in this relation.

The right of protection always expresses itself thru diplomatic channels, and is therefore, frequently referred as diplomatic protection. It is this fact which has caused many states to feel that the invocation of the right of protection should come only after all the ordinary means of obtaining justice have been exhausted, or only in very exceptional cases. Conflicting views have given rise to many important questions of jurisdiction: to what extent can an alien expect protection, and how far the second state will permit the right of protection to be extended, can the individual oblige the state of which he is subject to protect him, is the second state bound to recognize an extended interpretation of the right of



protection and many other problems which are too numerous to mention. It is, however, in the municipal law basis of the right of protection as against the international law in this regard, and the municipal law basis for the duty of a state to protect aliens in contradistinction with the international law and the conflict of these fields of jurisdiction, and their interpretation where rests the crux of the whole matter of international liability. 1.

The question of protection and of the rights of aliens arise frequently in cases involving injuries to aliens on account of mob violence or riots, and in what is of infinitely greater import, in civil wars and insurrections. To what extent is a state liable for such injuries, and to what extent may the offended state demand reparation for the same?

In cases where the responsibility of a state is claimed for outrages upon aliens by mob violence, the liability of the former is much clearer than in insurrections or civil wars, for the many and complex elements do not come into play in a mere riot or mob outbreak which affect aliens during civil wars. The acts of a mob or riotous assemblage from the very nature of the latter, are likely to be a matter which would engage the responsibility of the state in which they occurred. A mob outbreak is generally an expression of popular passion, which, when it takes the form of an attack upon the persons or property of aliens may be looked upon as an attack upon the state itself. Thus the various outbreaks against the Italians in the United States have been of this nature and were regarded by Italy as an attack upon itself, inasmuch as the acts complained of were motivated by a sentiment distinctly anti-Italian in





character. Moreover, the difficulty of apprehending the offenders in cases of this sort, due to popular approval of the acts seem to strengthen this contention. On the other<sup>hand</sup>, the theory which is based on a praesumptio<sup>m</sup> juris et de jure attributing to a fault of the government the injuries therefrom arising from acts of mobs, is not quite correct. The <sup>most perfect police system</sup> ~~e~~<sup>^</sup> cannot be regarded as omniscient and omnipresent. Mob violence from its very nature is swift and sudden and on this account it is wrong to impute to the government a fault which never existed is, in short, the confusion resulting from the Grotian theory of fault, which wrongly identifies the individual with an omission by the state. The Grotian view of responsibility, it may be said, is fallacious from two points of view. In the first place it unjustifiably imputes a participation of the state which does not exist, and in the second place puts the state on an equal footing with the individual. 1. Grotius distinguished between positive acts and omissions as we have seen, but many writers regard the responsibility without the direct culpa, as a responsibility quasi ex delicto 2. responsibility for act of commission, however, being considered as a complete delict. What these writers regard as a delict (or quasi delict) without the direct culpa of the state is simply the act which a state commits thru an omission, and, as we have already seen, responsibility may be engaged equally for acts of commission or omission.

As a rule, liability is created by injury to aliens in mob outbreaks, and since the publicists lean, for the most part, upon the Grotian theory of fault, they think that there must be a fault of the state, for, they argue, how else could there be a liability on the part of the state? But from the broad viewpoint of inter-

1. Triepel, p. 335.

2. *L'Année Rivier. opcit.* II 43



national practice we are constrained to admit that liability can arise without a positive act or omission on the part of the state, itself involving the fault of the latter. International law imposes upon a state the duty of protection of aliens; this duty is violated by the subjects of said state without the least opportunity or possibility of a fault on the part of the state itself. According to the Grotian view the state would not be responsible in the international law. Yet, there has been a violation of a rule of international law, namely the rule which imposes the duty of protection upon a state; and an infraction of international law we learned above gives rise to responsibility. Clearly then, there are some cases in which the Grotian view cannot be applied. The matter hinges upon the question of what constitutes fault.

It is clear that injuries may be done to aliens, especially in civil wars, without the knowledge of the state and hence, without possibility of the latter preventing such injuries. Could we say that in such a case the state had committed a fault? And so, in mob outbreaks, the question of fault of the state is of even greater importance as the facts in such cases are always harder to determine. We have indicated that it is impossible for even the most perfect police system to prevent riotous assemblages from committing injuries to aliens and from this point of view there must certainly be some limitation upon the duty of protection. Moreover, if we accept the view that if a state has used due diligence, it is <sup>not</sup> held to be at fault and this view is almost universally held, we would reach the conclusion that under such circumstances there is no fault of the state, although there is a situation where the responsibility of the state may be claimed. Take for an instance the celebrated





Aigues Mortes affair in France which we shall presently discuss. A number of Italians were killed in a mob outbreak, and from the documents in the case, it is reasonably clear that all possible means were taken to quell the disturbance, in fact, it would be difficult to deny that France had not used due diligence. Nevertheless, the killing of the Italians had engaged the responsibility of the French state and though there was no clear fault on the part of the government, France acknowledged its responsibility and paid an indemnity. Similarly in the so-called Fortune Bay case, where British fishermen attacked United States subjects while fishing in the bay of that name, and where there was little or no possibility of protection on the part of the government officers. Certainly, there could be no fault of Great Britain involved here, for it was manifestly impossible for the state to have exercised its jurisdictional powers, and the treaty provisions in regard to aliens had been violated. Great Britain finally acknowledged her responsibility and paid indemnities.

We are led to conclude, therefore, that just as in private law there are cases in which it has been recognized that there is a responsibility without fault either by act of omission or commission so, too, in international law, there are cases in which the responsibility of the state may be engaged when there has been no fault on its part. The responsibility therefor, especially in cases of mob violence cannot be said to depend on the fault or degree of fault of the state, but it proceeds from the nature of the facts in the case.

We shall now turn our attention more particularly to the question of the responsibility of the state for aliens in cases arising





during civil wars and insurrection, a matter which is of considerably greater import than the responsibility for injuries resulting from mob violence, not only because the instances are more numerous, but because the liability of the state for injuries arising in insurrections and civil wars is much less clear, and involves many important points of jurisdiction, of intervention and of sovereignty.

In the instructions drawn up by Dr. Lieber for the armies in the field in 1863, insurrection is defined as "the rising up of people in arms against their government or a portion of it, or against an officer or officers of the government. It may be confined to a mere armed resistance, or it may have greater ends in view." 1. A civil war on the other hand, was said to be, "war between two or more portions of the country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government." In the subsequent discussion, however, these distinctions will not be maintained, inasmuch as they are rather arbitrary and difficult to follow, especially in the Latin American countries. Let us examine first of all, the various arguments which are arrayed against the assumption of responsibility.

The older writers declared that the idea of reciprocal responsibility was in opposition to the idea of sovereignty, and if there was such a thing as responsibility, it proceeded from the will of the state where the acts had been committed. Gradually, however, the exigencies of the moment had brought about a change in the practice. 2. The present doctrine in regard to responsibility

1. Davis, *Elements of International Law*, p. 523.
2. Bonfils, *Traité*, p. 172.



seems to have been closely bound up with the view of Grotius, namely that there is no responsibility without fault on the part of the state. This we have discussed. These views, however, as Bonfils points out are fallacious inasmuch as the moral binding force of international law, and ~~confound~~ creative with sanctioning law and which would enable a powerful state to act about as it chose. 1.

More recent writers, however, attaching themselves more closely to the Grotian view, find a variety of reasons why a state should not be responsible for injuries sustained by aliens at the hands of insurrectors. As a general rule, the stock argument which is presented is that a state is not bound to accord greater rights to aliens than it would grant to its own subjects in similar cases. Especially, is this the view of Pradier-Fodère and of Calvo. Thus the latter states in his work on international law: "To admit in this case (internal strife) the responsibility of governments, that is to say, the principle of indemnity, would create an exorbitant and pernicious privilege essentially favorable to powerful states and prejudicial to weaker nations and to establish an unjustifiable inequality between nationals and foreigners. On the other hand, in sanctioning the doctrine which we combat, one does, altho indirectly, a deep injury to one of the constituent elements of the independence of nations, that of the territorial jurisdiction; just here, indeed, is the real bearing, the true significance of the recourse so frequently taken to the diplomatic channel for the purpose of resolving questions, whose nature and the circumstances in which they are produced place them within the exclusive domain of the ordinary tribunals." 2. Calvo is more distinctly a writer of

1. Bonfils, p. 173.

2. Calvo III, p. 1280; III, p. 142.





the older historical school, for he bases his arguments more upon the supposed violation of sovereignty than upon the principle of equality between aliens and nationals. Moreover, he sees in the right of protection over subjects abroad, a particularly dangerous instrument which evidently he would limit to a sort of supervisory function, without any recognition of the right of diplomatic intervention.

Pradier-Fodère attaches himself to Calvo, for, in stating that aliens may enjoy no greater privileges than nationals, he says that states have always denied responsibility, and if they ever have given indemnity, it has been in the form of pecuniary aid, declaring that such an act was one of spontaneous liberty, which placed them under no obligation whatsoever. As to the truth of this statement we shall see presently. 1.

Other writers, notably Fiore,<sup>2</sup> believe that a state is responsible unless it can show that it has used due diligence in suppressing riotous outbreaks, for if it has been in any way guilty of criminal negligence, responsibility will arise, except, however, in cases of vis major, which we <sup>sometimes</sup> ~~generally~~ call Act of God, a state cannot be held responsible. But what this vis major may be, the state is left to decide. In fact, it is a favorite doctrine of municipal law, which has been transferred to international jurisprudence as a principle which would enable a state to justify certain acts, which would admit no other justification. This has been especially true of cases of mob violence, as we shall see in our study of the cases in this connection.

A third argument which is advanced by many publicists to deny the liability of the state is also a creation of municipal law which

1. Pradier-Fodère, Traité etc. V. I p. 343, 537.

2. Fiore, Le Droit Int. Codifié Antoine Ed. (1911) p. 326 et sq.



has been carried over to international law. It is the so-called theory of risk. The adherents of this theory assert that when an alien settles in a country, he assumes a certain risk. "When strangers enter a state", says Hall, "They must be prepared for the risks of intestine war, because the occurrence is one over which from the nature of the case the government can have no control; they cannot demand compensation for losses or injuries received both because, unless it can be shown that a state is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a state." 1.

Oppenheim likewise adheres to this view. There is, however, yet a different application of the same idea of risk, namely that the state by taking the alien under its protection assumes the risks of the wrongs or injuries which may happen to him. This is essentially the same principle as the one which Hall supports except in the fact that it has a different application. 2. The risk is called the risque étatif and has recently been quite widely supported. This theory of risk is to supplant the theory of fault, and the state on the theory, ubi emolumentum, ibi onus esse debet, is responsible for the injured alien. The state, however, may extricate itself from this responsibility by proving the fault or negligence of the victim.

1. Hall, International Law, p. 231.

2. Rougier, p. 472.





We have already said that the theory of risk had supplanted the doctrine of fault in the eyes of some international law writers. In addition to the general theory<sup>of</sup> fault in the international law there are also adherents to the idea that if there is fault it must be met by a civil responsibility. These are mainly the writers who have been led astray by the existence of municipal law regulating responsibility, a matter which we have sufficiently explained in the preceding chapter.

Aside from the specific cases where the responsibility of a state is engaged and aliens are not entitled to indemnity we have therefore three main arguments against the theory of responsibility insurrection in civil wars: first, that aliens are not entitled to better treatment than nationals; second, that civil war is a case of vis major for which the responsibility of the state may not be engaged; third, that when an alien enters a country, he does so at his own risk: *ubi emolumentum ibi onus esse debet*, and again the same theory applying to the state in the so-called risque étatif. Let us examine these respective views and ascertain exactly what bearing they may have upon the present problems.

No nation would be inclined to demand from another nation greater privileges for its subjects residing in the latter state, than the nationals of such a state enjoy themselves. Nor has it a right, strictly speaking, to do so. All it can demand is that its subjects be treated in accordance with the rules of international law. When these duties of the state have been violated by injury to aliens in a civil war, the responsibility of the state is engaged, not, indeed for the injury done to the aliens per se, but for the injury to the state which has been committed by the violation of the international





obligation. Two possible consequences proceed from the responsibility, the duty of satisfaction, or the duty of compensation. This principle has already been laid down. Both of the duties are to the injured state and not to the individual injured, for the individual is not recognized in international law except as an object of rights and duties. There is even a question whether or not the state is obliged to give the amounts received in compensation for injuries to aliens to the injured parties. If the offended state does pay this amount to the injured nationals, it usually does, then whatever inequalities arise between nationals and aliens are simply incidental and cannot be said to have any effect in international law, for in principle the aliens injured receive the money from their own state and not from states where they were injured and this is res interna. However, it has been argued that the mere fact that the nationals of a state tacitly accept the violence done them in a civil war, and make no protest cannot be considered a legitimate reason why the aliens who have suffered in a similar manner should not make reclamations against the state. Thus, Rivier<sup>1</sup> argues: "It is alleged in order to deny the existence of this obligation of responsibility that the alien who is settled within a certain territory should not be better treated than the nationals. This is true in principle. But if the national suffers from the reigning disorder in a country, it is because he has no means of compelling indemnification. Why should the alien be obliged to suffer equally, if this state, espousing his cause, has the means of forcing the other state to indemnify him." This is the view of many other writers, among them Brusa, and yet, it seems that it has

1. Rivier - Droit des Gens II, 43.



overlooked the essential element of responsibility, namely, the fact that responsibility is a relation between states. Nevertheless, even if this were true, it would mean the introduction into our international theory of might makes right, a medievalism for which there is no place in modern jurisprudence, and which would mean an inseparable obstacle in the way of a sane development of international law.

The fact that the relations in cases of responsibility are so distinctly between state and state would seem to add weight to the view that reclamations should be made thru diplomatic channels, and that the aliens need not be compelled to settle the matter of reparation thru the ordinary local courts. Should aliens have recourse to the local courts, then they put themselves on a basis of equality with the natives and as regards any rights which they personally may enjoy under the duty of protection by their own state, these are extinguished. In other words, a new status is created which supercedes that which existed under objective international law. Whether the matter be settled in local courts to the satisfaction of the injured alien or not this would not effect the question of the satisfaction of international injury. On the contrary, for the relation between the states would not be affected by a private action in a municipal court. The fact, however, that very frequently action is brought in municipal courts by aliens would seem to strengthen to a certain degree the view that the local remedies should be exhausted before diplomatic recourse could be resorted to. This argument, however, is without any real basis and indeed, seems to be another result of the confusion of indemnity with responsibility itself.





To sum up then the facts relative to the contention that aliens should receive no better treatment than the nationals of a state are accorded, we find that the relative treatment of aliens and nationals in international law is supposed to be the same, and that if, by receiving indemnity, aliens appear to be more favored, this is an incidental effect which has no real international basis. It is merely a question of the relation of the parent state to its subjects, a matter with which international law has nothing to do. In the second place, the international questions which are involved in cases of responsibility would make it desirable that such cases be settled thru diplomatic channels, without reference to municipal courts.

The question whether a civil war is to be regarded as a case of vis major, or force majeure is more involved and must be decided from the facts in the case than from the abstractions of legal theorizing. As a rule vis major is regarded as the interposition of violence proceeding from human agency, of such a character as to be uncontrollable by the entity against whom it is directed. Sometimes, however, it is held to be synonymous with the idea of "Act of God." It is difficult to look upon civil wars and insurrections in general as cases of vis major, for these are matters from which it is impossible to exclude absolutely the element of will. Revolutions particularly the sort which flourish in Latin America are scarcely to be regarded as the blind forces of nature at work, especially in the cases of rapine and plunder, or even in the ordinary acts of war which depend upon human violation. The doctrine of vis major should be one ~~to be~~ invoked only in exceptional cases where there has been no possibility of maintaining order. In short,



the invocation of this doctrine must depend on the facts in the case for insurrections cannot be said to be one and all cases of vis major. These facts, according to international practice, must stand out plainly, for only in exceptional cases has such a plea had any great validity. Thus, the War of Secession in the United States is a good example of a civil war which was generally regarded as a case of vis major, and in fact has been one of the very few well defined cases of this sort. The fact that a civil war itself is not always a case of vis major does not preclude certain events during the insurrection from being so regarded and responsibility being refused for the claims arising from such cases. This has frequently been the case in South America. On the whole, therefore, we may say that the theory of vis major is one which can be applied only in exceptional cases depending on the facts in the case, and can in no wise be regarded as applying to civil wars or insurrections in general.

We turn next to the double theory of risk which from one point of view argues non - responsibility and from the other, a qualified responsibility. There is something to be said for both view. Those who believe that an alien entering a country does so at his own risk, argue that such a person enters a state solely for the means of benefiting himself and if the state accrues any advantages, these are accidental and unintentional; and since the alien is acting just for himself, it is but right that he should bear the brunt of whatever reverses may come to him. The adherents of the risque étatif, however, can see in the advent of the alien to a country solely a benefit to the state, for which the latter should be willing to pay, by assuming the risk of responsibility for any injur-





ies to the former. But these views are neither quite correct, in that they are based on the question of to whom the advantage of an alien settling in a given state accrues which is not a particularly tenable ground. The alien entering a country, unless it is known to be in a state of intestine commotion, does not assume any risk. International law has given him the right of protection in person and property by the state in which he settles, and just as far as this right extends, he cannot be said to have assumed any risk. The duty of protecting the person or property of alien by a state is absolute. It is limited only by the fact that the alien may be entering a country in which the order is not established and then he clearly does so at his own risk.

As regards the risque etatif aside from the fact that it is based on the dubious ground that an alien settling in a country is of direct benefit to the state, the chief criticism which is to be made of the theory, is that in order to be tenable it would of necessity have to apply to nationals as well, for by not doing so, it would discriminate against them, and such a proceeding would not be just. 1. If this were remedied, however, it would mean that all inhabitants of a country would be on the same legal basis, a fact which would put the question of the treatment of aliens upon the basis of internal or municipal law rather than international law, a matter which international jurisprudence during the last century has been trying to avoid.

One general criticism, however, may be applied to the whole theory of risk, in both its individual aspect and also in that of the risque etatif, and that is the fact that its private law character is with difficulty translated into a public law character, and



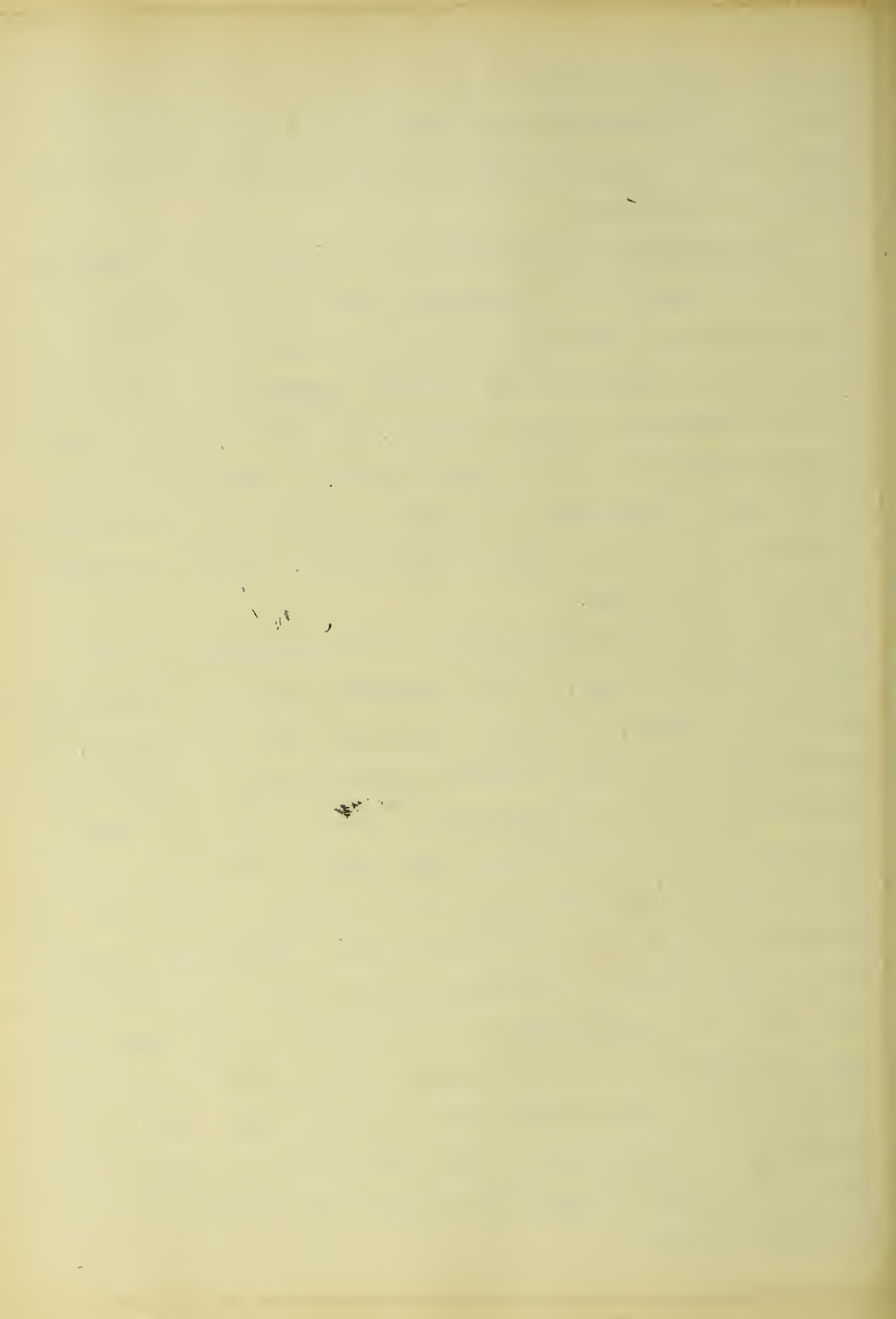


for this reason is likely to give rise to no little confusion. Moreover, the opponents of one view can call upon the other to support their arguments, and by this means would soon destroy the efficacy of both views.

This completes the discussion of the three general opinions why a state should not be responsible for injuries sustained by aliens. We have endeavored to show that in no way can any one of these views be regarded as an absolute argument why a state should not be responsible. On the contrary, the first one has no international significance, and the last two may be applied only under exceptional circumstances. We shall now proceed to discuss the question of when and why a state is responsible, and what exceptions there are to the rule.

There are two cases in which the responsibility a state is almost absolute: first, for its own direct acts, and secondly, for acts of its agents. As regards the direct acts of the state, the matter is so clear that it needs no amplification. A state, as any personality at law is responsible for its own acts. As regards the acts of its functionaries. These may be divided into acts of administrative authorities, and acts of judicial authorities. The responsibility for the acts of functionaries is not upon a material basis as in the case of responsibility for acts of private individuals (that is to say depending on the character of the act), but is more distinctly on a personal basis. The relation to the individuals concerned, rather than to the act itself makes the state responsible. 1. In addition to this distinction, the acts of different sorts of officers or agents, is the difference between the acts

1. Triepel, p. 348.



done within and without the scope of the officers agency. 1. As regards the acts of officers within the scope of their agency it is clear that acts performed in pursuance of the commands or advice of the government, if such acts are in contravention to the principles of international law, will be regarded as acts for which the government is responsible. Just how far this principle is to be extended to the acts of military authorities is a matter which will depend on the nature of the acts. As a rule it may be said, that such acts will give rise to an obligation of responsibility on the part of the government, if they are acts which would give rise to compensation under the law of war. But the matter of military authority we shall presently discuss more fully. The enactment of laws or decrees by which a state declares that it is not responsible for acts of its agents, are entirely without international sanction or force, and can only be looked upon as an unjustifiable attempt on the part of the state to extricate itself from its international obligations.

It may be said of acts committed without the scope of an officer's agency, that it is a rule of international law, that the government is not liable in diplomatic procedure for damages caused by officials acting beyond the limits both of their real or apparent authority. Thus if an official is guilty of gross misconduct, the sovereign would not be held liable. Even in municipal law there can be no question of a government's liability in any way for illegal acts of officers. Municipal law should always provide means of recovering against such individuals. International complications arise when it fails to provide such legislation, and not from the acts themselves. An act outside an officer's agency can no more give rise to an international obligation than a burglary or an

L. VI Moore Digest, 740.





ordinary holdup.

More important to our subject than the matter of responsibility for administrative officials, is the question of the responsibility of the state for acts of judiciary exclusive of matters of jurisdiction, questions which are usually known as denial of justice. Let us briefly consider the question of denial of justice, what constitutes such a denial, and to what extent a state may be responsible for such acts of the judiciary. These problems come up usually after a civil war is over, when questions of compensation and the entertaining of suits arise. Denial of justice may be defined as the act on the part of the state refusing to aliens the ways and means of recourse necessary to the receiving of justice, and generally speaking, is conceded as being an infraction of an international duty of the state. To refuse an alien such recourse is an indirect authorization of others to depradate on the person and property of aliens with full impunity.

Turning to the consideration of exactly what may be said to constitute denial of justice we find that part of the duty of protection over aliens which a state owes, is to give them recourse to the tribunals of justice. When this duty has been performed, the obligation of the state has been fulfilled. Nor can a state, except in extraordinary cases, be held liable for the result of an action in the courts of the country. There is no international obligation on the part of states to see that the decisions of the courts are intrinsically just. 1.

It was mentioned above that fact that in some cases the state will be held answerable for decisions of the courts. Such cases are not to be considered per se a denial of justice, but the state

1. Anzilotti in *B.P.D.I.P.* 22.



is responsible because by the decision, some international norm has been violated. Therefore such cases of responsibility for decisions of local courts is not responsibility for denial of justice, but for violation of international law. There are some writers, however, who believe that an unjust decision may constitute a denial of justice. They argue that in countries where prejudice against aliens is so pronounced as to effect the decisions of the court, these decisions may be said to be essentially denials of justice. The judicial acts of a state are just as much state acts as those of administrative officials; they are not recognized as acts of the judiciary, but as acts of the state itself. Thus, they argue, an unjust decision by such as tribunal is equivalent to a denial of justice by the state itself.

A better view of the matter is to look upon it objectively as a question of the status of aliens. The state is only obligated to accord to the latter access to the tribunals, and that further than this the right of protection cannot extend. Protest cannot be made unless there is a deliberate violation of international law, and such we may call a decision which, at the same time it pretends to give justice, constitutes nothing less than a denial.

A second class of cases which engage the responsibility of a state in time of civil war, are those cases for which a government is held liable according to the law of war. These acts may be those of military officers which have the direct sanction of the government. Such acts, as we have already seen would be regarded as acts of the state itself and naturally would engage its responsibility. On the whole, there are only the grosser acts of war. Thus the state would be responsible as a rule for damage resulting from





bombardment or building fortifications and numerous other cases.<sup>1</sup> There is some question as to whether all acts of depredation should be indemnified, but as a rule, this has been done, except for some the petty matters for which it would be ridiculous to hold a state liable. Prestations of war such as the employment of *angaria* give rise to responsibility, in virtue of the law of war itself.<sup>2</sup> Acts of necessity on the other hand, cases of vis major will not give rise to responsibility. But here, <sup>again,</sup> as in all questions which depend on the determination of facts, it is the determination of facts itself which is the most important factor in establishing responsibility.

In contradistinction to the responsibility of a state for the acts of government troops is the question whether or not it may be held liable for the acts of rebels, and on this point there is a great variety of opinion. There are two cases in which very clearly a state could not be held responsible. The first is when the insurrection has reached such a serious stage of development that the whole armed force of the nation is engaged in attempting to suppress it. The best example of non-responsibility in a case of this sort to be cited is the United States during the War of Secession. The second case in which a state is not responsible, and which we shall presently discuss more fully, is when the belligerence of the insurgents has been recognized.

It may be laid down that as a general rule a state may not escape its responsibility even in time of revolution. Clearly, if a state has not recognized the belligerence of insurgents, they cannot address themselves to the organs of government of the insurrectos, and must turn to the de jure government of the state,

1. Wiesse, p. 67.

2. Bar in R. D. I. 474.





who alone is to be considered as having vested in it the power connected with the management of foreign affairs, and which therefore is still the only body charged with the accomplishment of international duties towards foreigners and especially when these duties are reenforced by treaty stipulations. These principles have been repeatedly enunciated by statesmen, not only in Europe, but also in the United States, yet, they certainly cannot be accepted as absolute. The insurgents are not under the control of the government, and it is patently impossible for the de jure government to be responsible for all of the acts of insurgents. To be sure a state may divest itself of all liability for the acts of insurgents by simply recognizing their belligerency, but until it does this, such insurgents are yet dependents of the government which pretends to have authority over them. As in the cases of the responsibility of the state for acts of war, the liability for acts of insurgents may be said to depend on the facts involved in the case. Nevertheless, it may be laid down, that the state is responsible solely for the acts of war or abuse of power by rebel authorities in the same measure as it is responsible for its own authorities.<sup>1</sup> Nor is this rule to be regarded as absolute, but states will in all probability do just as the exigencies of the circumstances direct. These matters will stand out more prominently, however, in connection with the discussion of the cases involving such problems.

The responsibility for acts of insurgents, which we have just discussed, is based upon the presumption <sup>that the de jure government emerges successfully</sup> from the contest. In case, however, as often happens, the insurgents government should become the de jure government, the responsibility for acts of rebels

1. Rougier op. cit. p. 478.



is clear. It is liable not only for the acts of its own officers, heretofore rebels, but also for all those acts for which the former government would have been responsible, in virtue of the principle, forma regiminis mutata, non mutatur civitas ipsa. A new government can never escape its liability for acts of the former government, for these are essentially acts of the state, and the obligations of the state continue, whatever reversal may take place in the actual form of government itself. 1.

In addition to the general cases of responsibility already mentioned, there is yet another time when a state will be considered responsible for the injuries sustained by aliens, and these cases arise when aliens have been injured as aliens, or as subjects of a particular state. This matter we have discussed fully in connection with the responsibility of a state in cases of mob violence and therefore does not need to be enlarged upon.

To sum up, then, we find that the state is responsible in civil wars and insurrections, for its own acts, for the acts of its agents, for acts for which the law of war requires responsibility; to a limited extent it is responsible for acts of rebels, and entirely so, if the *de facto* government is victorious; and finally, if the aliens were injured as aliens or as subjects of a particular state.

To these general rules of responsibility, then, are, however, certain important exceptions. In the first place, a state is not responsible when the alien has lost his nationality (*heimatlos*); secondly, when the alien is himself at fault; third, when a treaty disclaiming responsibility exists between the states concerned; fourth, when the belligerency of the insurgents has been recognized

by either the claimant or respondent state; fifth, when an alien  
 1. This principle criticised because it would incline those persons injured by revolutionists to wish the victory of the de facto government.





enters a country where the social order is not established, or in contravention to an order of expulsion or decree declaring such territory to be closed. 1.

Of these matters little discussion is necessary, as the grounds for non-responsibility are clear. As regards the alien who may have lost his nationality, it is manifestly impossible for him to demand protection from a state to which he never expected to return. Certainly if an alien settles in a country sine animo revertendi, he is entitled to no greater measure of protection than the nationals of such country themselves. Nor would the alien be entitled to claim the responsibility of a state when the act of which he complained was the result of his own imprudence or fault. Thus, frequently, cases have arisen when aliens injured by mobs have really abetted such injury by this provocative attitude.

When we come to the study of the Latin American jurisprudence 2. in regard to responsibility we shall find that between a great many of these states and the European states as well there exist treaties in which the signatories declare themselves reciprocally not responsible for injuries or prejudices sustained by their nationals residing in the respective countries. Whatever may be the merits or the demerits of such treaties from the point of view of expediency, it is clear that between the signatories such treaties will be binding and no claims beyond those recognized in the treaties may be made against one of the states by the other.

It has been indicated before, that the recognition of the belligerency of insurgents relieves the parent state of all obligations of responsibility for the acts of such insurgents. The

1. Cf. Rougier loc. cit. also

Wiesse loc. cit.

2. Chapt. IV.



government of the insurgents when belligerency is recognized, becomes the organ to which a state may address itself for the acts of said government. All obligations of the de jure government cease. Finally, we mentioned that aliens may not claim the protection of a state, when they enter a part of the country in which the social order is not established; either when this is a notorious fact, or when the de jure government has expressly decreed that such country aliens or nationals enter at their peril. Thus an alien entering a country under these circumstances would be likely to do so only for reasons of personal gain, and for this reason if for no other, he could not expect to receive protection from a state which had repudiated its control over such a region. The same argument holds good when an alien enters a country in defiance to an order of expulsion. He does these things at his own peril. 1. In these connections, it will be worth our while to quote the rules regarding the responsibility of states for injuries sustained by aliens in civil commotions, which were adopted by the Institute of International Law at this meeting in 1900. The rules are as follows:

"Independently of cases where indemnity may be due to aliens in virtue of the general laws of the land, aliens have right to indemnity when they are injured in their person or property in the course of a riot, an insurrection or a civil war: 3.

(a) When the act from which they have suffered is directed against aliens as such, or against them as subjects of a given state; or

(b) When the act from which they have suffered consists in closing a port without previous notifications

1. The theory of risk would be applicable here.

2. ~~Annuaire~~ *Annuaire* XVIII, p. 255 et sq.

3. These rules it will be noted take an objective viewpoint. Instead of discussing the rules of responsibility which is essentially the point of departure. It is the old error of confusing the public and private law character of responsibility; the subjective with the objective. From the point of view of theory these rules are wrong. From the viewpoint of international practice they would be justifiable.





at a seasonable time, or in retaining foreign vessels in port; or

(c) When the injury is the result of an act contrary to law committed by an agent of the authority; or

(d) When the obligation of indemnity is founded upon the general principle of the laws of war.

- II. The obligation is likewise established when the injury has been committed (No. 1. (a) and (d) ) on the territory of an insurrectional government, either by said government or by one of its officials.

Nevertheless, certain demands for indemnity may be set aside when they are based on acts which have occurred after the state, to which the injured individual belongs has recognized the insurrectional government as a belligerent power, and when the injured individual has continued to preserve his domicile or habitat within the territory of the insurrectional government.

"In so far as the latter is recognized by the government of said injured individual as a belligerent, the demands provided in line 1 of article 2 may be addressed only to the insurrectional government, and not to the legitimate government.

- III. Obligation to indemnify ceases, when the persons injured are themselves the cause of the events which have occasioned the injuries. Especially is there no obligation to indemnify those who have entered a country in defiance to a decree of expulsion, nor those who go into a country to engage in trade or commerce, when they know, or ought to know that disturbances have broken out, any more than those who established themselves or who sojourn in a land which offers no security at all, in consequence of the presence of savage tribes, unless the government of said country has given special assurances to the immigrants.

- IV. The government of a federal state, composed of a number of small states, which it represents in international affairs, cannot, in order to escape from the responsibility incumbent on it, invoke the fact that the constitution of the federal state confers upon it neither the right of control over any single state, nor the right to compel them to satisfy their own obligations.

- V. The stipulations mutually exempting states from the duty of extending their diplomatic protection must not include cases of denial of justice or of evident violation of justice, or of the law of nations (*jus gentium*)."

In addition to these general rules which were laid down by the Institute certain recommendations were made which likewise are of





importance. They provided:

"The Institute of International law recommends that states refrain from inserting in treaties clauses of reciprocal non-responsibility. It believes that such clauses are wrong in exempting states from the performance of their duty to protect aliens within their own territory.

"It believes that states, which by reason of extraordinary circumstances do not feel that they are in a position to insure to a sufficient degree the efficacious protection of aliens within their territory, may escape the consequences of such a state of affairs, only by temporarily interdicting aliens access to their territory.

"Recourse to international commission of inquiry and to international tribunals is, in general, recommended for all differences which may arise on account of injuries sustained by aliens in the course of a riot, an insurrection or a civil war."

The criticism of the action of the Institute of International Law has already been pointed out in a footnote. Aside from this fact, that they treat the question objectively and not subjectively, which is, <sup>indeed</sup> of supreme importance, these rules embody most of the principles of responsibility which have already been discussed. The question of diplomatic intervention due to the critical condition in which the law in this regard was, was purposely omitted. There can be no question, however, in our mind, that if responsibility is to be treated as a matter of public law and not of private law, if it is to be looked upon as essentially a matter of international law and not of municipal law, if the alien is the object and not the subject of the duties of one state to another, then questions of responsibility cannot be settled by the municipal courts of the countries concerned, but solely by the ways and means provided for in international law. These questions can only be taken cognizance of by the diplomatic channels, and whether or not the problems are to be finally decided by international mixed commissions or international tribunals of inquiry is a matter to be determined by such



diplomatic channels. We repeat, questions of international responsibility are matters to be handled by diplomatic channels alone.

There remains yet an important point to be discussed in connection with the international liability of a state, the question whether or not a federal state may refuse to admit its own responsibility for the acts in violation of international, committed either by or within the constituent states of such a union, and whether these states are liable in international law. This question has been a practical one, over which the discussion has, at various times, been very heated. Especially have these problems come up in the United States, where on numerous occasions the national government has attempted to escape liability, by invoking the principles indicated above. We have mentioned the rule adopted by the Institute of International Law, but setting aside for a moment the pertinence or justifiability of such a rule, let us inquire more intimately into this question of the responsibility of a federal state.

We know that a federal union is a sovereign body composed of a number of non-sovereign states who share in its expression of will.

1. Such non-sovereign constituent states are to be differentiated, moreover, from dependent states by their share in the government. Generally speaking, we look upon the formation of such unions as the surrender by the constituent states of certain of the sovereign powers which previously they had held, the new central organ, and among the sovereign rights usually surrendered, is the right to represent the body of states in its international existence. When such a federal state is received into the family of nations, and it becomes a subject of international rights and obligations, the fact

1. *System des Subjektiven Öffentlichen Rechts*, p. 295.





that all the potentialities dealing with the foreign affairs of the country which formerly the various states possessed are vested in the central government bring it about that only the central government of the state is recognized as having international capacity. 1. This is all the more true, when we consider those federal states are formed more frequently as the result of pressure from without, than from internal necessity, which would seem to emphasize the basis necessity of an international existence solely in the central organ of the federal union.

The question of the relation of central to local state government is important but only from the view of internal law. As a matter of international law its significance is nil, except insofar as the actions of these states may give rise to an international liability. The constituent states are not cognizable in international law, but in so far as they have surrendered their sovereignty, the federal union is answerable for their acts, as for its own acts or for acts of its agents. Diplomatic complaint may be addressed to it, and to it alone. But the difficulties which arise in this connection do not proceed so much from the question of who or who is not responsible, but proceeds from responsibility, the questions of satisfaction or compensation.

When the question is merely over compensation, the matter is fairly clear. The federal government will furnish indemnity, and settlement with the state at fault it may bring about as best it may by its internal law. But in questions of satisfaction the problems are more difficult. Very often the duty of satisfaction consists solely in the punishment of the offending parties, and when such is the case, there are often conflicts of jurisdiction between  
1. Triepel, p. 361.



the states of the union, and the union itself. This has actually happened in the United States where the peculiar distribution of powers has made the conflicts of jurisdiction a serious matter which has had effect upon the international points at issue. Thus, when a riot breaks out in a state, it is the duty of said state to punish the rioters, but if it does not do this, the federal power is unable to have any recourse. If aliens are injured in such a riot, the federal state is responsible, and if the punishment of the offenders is required as satisfaction, it is internationally obligated to provide such punishment. But as this is a matter cognizable only by state courts, the national government is powerless if the state refuses to do this. The dilemma is evident, and is increased by the fact that such a state of affairs is looked upon in international law as a failure of the central state to provide the necessary legislation for the carrying out of its obligations at international law, a matter which can likewise give rise to an international liability. 1. Such a state of affairs is to be remedied by a revision in legislation. It is interesting, however, as one of the numerous questions which may arise in connection with the peculiar jurisdictional segmentation of a federal union. These questions will come up more squarely in our discussion of the practice of the United States where we shall examine more in detail the various questions arising in these connections. It must be remarked, however, that the constitution clearly provides the basis for complete control by the central government over exigencies of this sort. 2.

A word yet in regard to the responsibility of states for acts committed in dependencies or protectorates. In the former case the 1. Baldwin, *La Responsabilité du pouvoir fédéral* R.Cand v.IV p.437; also Burgess, *Federal Gov't. and Int. Rep.* Pol.Sci.Quarterly VI p.338. 2. Cf. Burgess' article mentioned.





responsibility is well defined and the state may be said to be responsible the same as for acts committed within its own actual territorial limits. In regard to the responsibility of a state for acts committed in protectorates, some writers have held that the responsibility is indirect, 1. but this cannot be laid down as an absolute rule, for it would seem much more plausible that responsibility of the protecting state would depend entirely upon the closeness of the relation between it and the protectorate.

This completes our study of the nature of the internal responsibility of a state, and its relation to the problems which will be more fully discussed in the succeeding chapters. We believe that we have established the fact that the responsibility of a state is the rule, and that non-responsibility is the exception. For a long time this principle was disregarded by states, but at present the intricacy and delicacy of international relations, especially in Europe has brought it about that practice is more closely coinciding with the theories which we have advanced. It is true that many states whatever their practice may be still adhere to the view of non-responsibility but these views of non-responsibility are based upon the fact that such states do not recognize the absolute public law character of responsibility, but look upon it as a matter sometimes of public and sometimes of private law, just as is suited to the exigencies of the circumstances. We believe that we have shown the basic fallacy of the views, and it yet remains for us to show how international practice has gradually drawn away from the municipal private law view of non-responsibility, to a recognition of the essentially international public law character of these obligations of the State.

1. Thus Anzilotti, in 13 R.D.I. P.





## Chapter III.

## The Practice of the Leading European States.

We pass from the consideration of the general theory of responsibility of states for injuries sustained by aliens, to a closer examination of the practice of the leading countries both of Europe and of the Americas. We shall find that two questions present themselves with almost monotonous regularity. First, does the practice of the states accord with the theory of responsibility adhered to by the respective governments? Secondly is the practice of the leading states uniformly consistent, or does it bear out M. Calvo's statement that the theory of responsibility favors the large and powerful states, but that it is prejudicial to petty states? 1. Let us, in the first place, consider the practice of the European countries among whom the theory of responsibility originated and where it has undergone such an interesting development.

In the first chapter we saw that it was only with the latter eighteenth and the beginning of the nineteenth century, when it gradually was recognized that nationals themselves possessed certain rights and privileges, that nations began to demand protection for their subjects abroad. This demand, although it had been made in the early part of the century, did not arise in any important cases until the outbreak of the revolutionary disturbances of 1830, when numerous claims of responsibility arose.

1. Calvo, Le droit international, v. III, p. 142



Few countries have been confronted by such momentous cases as has Great Britain, and it was during the events of the Portuguese revolution of 1828-31 that she was first called upon to take a definite stand in the question of the responsibility of other states for injuries sustained by her subjects. 1.

English claims in Portugal arose through the excesses of the Absolutist party in power at the time. Don Miguel had been made regent in the year 1827 for his infant niece. Being an extremely ambitious prince he finally was able to have himself declared King of Portugal by a series of skillful political moves. The constitutional party immediately rose up in arms against him, but the Absolutists, determined to crush all opposition, imprisoned, banished and killed literally thousands of them. 2. The watchword 'Death to the Liberals and Freemasons' became the rallying cry of the lawless elements of the kingdom. Englishmen, as presumable adherents of the Constitutionals were beaten on the streets; 3 they were arrested and kept in prison for weeks without trial and were subjected to innumerable indignities. Lord Palmerston demanded reparations for certain of the cases, and upon threatening reprisal, they were complied with. 4. In the subsequent events of the reconquering of Portugal by the Constitutional party there were a number of cases where British subjects were subjected to brutal and violent treatment, but apparently no reparation was made.

1. For the facts cf. 18 Br. & For. St. Pap., 43 et sq.
2. Cambridge Modern History, X, 320 et sq.
3. Thus the case of McKenna and Munro, 18, Br. & For., 103-4
4. ibid. 268 et sq.





The French government fared considerably better. Their subjects had been victims of outrages similar to those which the British had suffered, but the action of the newly installed government was more vigorous. An expedition under Admiral Roussin was dispatched to the Tagus. <sup>were</sup> 1. The Portuguese<sub>^</sub> defeated and obliged to pay a considerable indemnity, besides losing their fleet through a naval engagement. 2.

It is evident that from the first, Great Britain took an advanced stand in regard to matters which concerned the safety of her subjects in foreign lands where civil war was being waged. So too in the revolutions in Italy in 1848 she demanded the responsibility of the governments of Naples and Tuscany for the injuries sustained by her subjects. But before we enter a discussion of this case let us examine the facts in the celebrated Don Pacifico case which <sup>was</sup> in 1847. 3.

Don Pacifico, a native of Gibralter residing in Athens, was the <sup>c</sup>victim of a mob in April 1847. The circumstances were as follows: For some years it had been the custom of Athens to burn an effigy of Judas Iscariot on Easter day. In the year 1847, in consequence of the presence of M. de Rothschild, the Greek government endeavored to prevent the observance of this custom. The brigands infesting the capital seized on the opportunity to spread a report that the interference was due to the action of Pacifico, who was of the Jewish faith. As a result his house was attacked in broad daylight by several hundred people who, instead of being repressed by the soldiers and gendarmes, were aided by them, and

1. Camb. Mod. Hist. X, 325      2. 18 Br. & For St. Pap., 395 for amount of indemnity      3. For the facts in this case cf. 39 Br. & For. St. Pap. 332 et seq.; also Moore Digest of Int. Law, VI, 852



were even headed by 'persons whose presence naturally induced the belief among the soldiers and the mob that the outrages they were committing would be indulgently treated by the government.' 1.

Pacifico it appears presented a claim to the Greek government, but despairing of ever having it recognized, appealed to the British government. He estimated his losses at something like, 31,500 ~~pounds~~. Unfortunately enough, the Greek government delayed for a long time to answer the notes of the British minister, and when it finally did reply, it deplored the fact that Don Pacifico had taken recourse to diplomatic channels, for the Greek authorities had made every effort to bring the perpetrators of the outrage to justice, and that beyond this the Greek government did not regard itself as responsible. Pacifico if he desired indemnification must bring his case before a local tribunal. 2.

The correspondence dragged on for a considerable length of time until finally on the failure of the Greek government to make compensation Great Britain instituted a pacific blockade of the Greek coast.<sup>3</sup> The blockade had been established but a short time, when France offered her mediation, and her good offices were accepted by both parties with the result that a convention was entered into and the various claims, including that of Pacifico were referred to certain commissioners. The final decision of the arbitrators was to allow Pacifico 150 pounds by way of compensation.

In the course of the arbitration Baron Gros, the French representative, expressed his views on the question of responsibility in a note to his government, which was later communicated to the

1. Dispatch of Sir Edw. Lyons. 39 Br. & For. St. Pap., 352

2. Note of M. Clarakis, *ibid.*, p. 347 3. This action was not solely to collect Pacifico's claims, but of several British subjects.





British government. 'In general', said he, 'the principle is admitted and this principle conforms to justice, that there can be no diplomatic intervention in cases where the local authority is not concerned. It is to the tribunals in conformance to the law of the land to which the injured party must have recourse and demand justice.' 1.

Lord Stanley a prominent leader of the House of Lords expressed a similar view, when he declared in a speech before that body, that 'it appears to me exceedingly doubtful whether on the part of the British government there was - I do not say just cause for complaint, but just cause for demanding indemnity from the government of Greece. I do not understand that where by no fault of a government offences are committed against foreigners the government is bound to indemnify these foreigners...I doubt whether the law of nations justifies any demand whatever.' 2.

Lord Palmerston, however, in a speech before the House of Commons June 25, 1850 justified the British course. 3.

'The Greek government', he said, 'neglected its duty and did not pursue judicial inquiries or institute legal prosecutions as it might have done for the purpose of finding out and punishing some of the culprits...A criminal prosecution - by M. Pacifico - was out of the question to say nothing of the chances if not the certainty of failure in a country where the tribunals are at the mercy of the advisers of the crown...The Greek government having neglected to give the protection which they were bound to extend and having abstained from taking means to afford redress this was a case in which we were justified in calling on the Greek government for compensation for the losses whatever they might be, which M. Pacifico had suffered. I think that the claim was founded on justice...But the Greek government denied altogether the principle of the claim.'

1. Calvo, III, 142-3 2. Hansards Parliamentary Debates, III, 1306 ser. 3 3. ibid. ser. 3, CXII, 394 et sq.





It was then he pointed out that the British government had been obliged to resort to a vigorous policy, and he concluded by justifying her course through numerous examples.

On the whole, although Pacifico certainly exaggerated his injuries, as the claims which he presented show, there was a certain amount of justification in the British attitude and in her rigorous method of enforcing her views.

In the case of the claims against Naples and Tuscany for the injuries resulting from the insurrections of 1848, Great Britain found herself in a different position. The two governments were supported by two of the most powerful European nations and were thus far better able to assert and maintain their position than was Greece.

In the year 1849 a number of English subjects in Tuscany and in Naples <sup>1.</sup> addressed themselves to their governments in order to compel the recognition of responsibility by Tuscany and Naples for injuries sustained by them as a result of the measures taken by these countries in suppressing the disorders of 1848. The British government immediately presented these claims and sent a fleet to Naples to support her demands. As the Grand Duke of Tuscany was an Austrian prince, the claims against Tuscany were presented to the foreign office of Austria. Prince Schwartzenberg, the Austrian Minister protested against the British action and in a note dated April 4, 1850 <sup>2.</sup> he expressed his astonishment that England should demand for her subjects in foreign countries ad-

<sup>1.</sup> For the facts in this case cf. Br. & For. St. Pap. v. 40, 41, 42 Correspondence relating to troubles of 1848. Calvo, III. 144. Pradier-Fodéré Traité du droit Int. I, 343. Bonfile.

<sup>2.</sup> Calvo, III, 144



vantages and rights which the nationals themselves did not enjoy. He went on to say that in case an alien settled in a foreign country, and this country were to become involved in a civil war, the alien would have to abide by the consequences. In conclusion he added 'that however the European nations might be disposed to extend the limits of the right of protection, they would never go so far as to grant to aliens privileges which the territorial laws did not grant to the nationals.' Every sovereign state should enforce and maintain its sovereignty by force of arms.

This however did not terminate the affair. The Tuscan and Neapolitan governments, anxious to settle the matter amicably decided to apply to Russia for mediation. Russia replied in a note of May 2, 1850 <sup>1</sup>. that the legal grounds so favored the defendant parties, that there was no occasion for arbitration. To arbitrate would mean to admit that the pending claims had some foundation, when they really had none at all. In short Count Nesselrode concurred with Prince Schwartzenberg. He clearly defined Russia's viewpoint in the following words:

'In accordance with the principles of international law which Russia professes it would be impossible to admit that a sovereign forced by the insurgency of his subjects to reconquer a city occupied by the insurgents would be obliged to indemnify aliens who in this event might be the victims of losses or injuries.'

In conclusion he pointed out that cases of this sort gravely involved the independence of the continental states, and for this reason England should relinquish her claims lest her subjects become a veritable pest and an instrument for revolutionists to embarrass

<sup>1</sup>. Calvo, III, 144-5





the de jure government. These two notes substantially put an end to British claims. 2.

I have quoted at length the opinions of the different governments concerning the question of responsibility, not only because of the historical importance of the two cases, but also because the opinions are those of the great statesmen of the time, statesmen whose views have found much favor with succeeding generations of publicists.

It is a noteworthy fact, that in practically all of the dispatches and speeches relating to the cases examined above, the point which is emphasized most is the obligation to furnish compensation. In no instance has either party to the controversy affirmed or denied the obligation of responsibility for injuries. In short, the result is made to outweigh the cause, for as we have already seen compensation proceeds from the recognition of responsibility, and without such recognition compensation cannot exist. Nor can this distinction be considered a mere academic view. The duty of satisfaction as distinguished from compensation, as we have seen, is frequently a consequence of the recognition of responsibility, and in international law occupies an equally important position with the duty of compensation, although states are more prone to demand the latter than the former. But to leave for the present the discussion of these purely theoretical questions, let us proceed to examine one or two further cases in which Great Britain made claims of responsibility.

1. England was not alone in presenting claims. France also sent a fleet to Naples and was able to secure indemnity for losses of French citizens.



A case of lesser importance which likewise arose during an insurrection took place in the year 1862 at the time of the overthrow of King Otho of Greece. 1. The successful revolutionists in the excess of their joy broke into the shop of a British jeweler and pillaged its contents. The houses of several Germans were likewise attacked and looted. The British consul immediately informed the Greek government that compensation was expected for the losses sustained by Mr. Hall the jeweler. Mr. Diamantopoulos replied in a note of October 27, 1862 that an official inquiry had been made into the affair, and that Mr. Hall would receive full compensation for his losses. 2.

The events in this instance require no comment. The newly organized government, anxious to ingratiate itself with the guaranteeing powers was only too ready to accede to any demands made upon it. Thus in the injuries of a member of a French and Austrian circus a large amount of money was paid. 3.

4.  
In 1870, a Mr. H.D. Jencken petitioned the British government to request compensation from the government of Spain for injuries received by him at the hands of a mob. It appears that he had been sent to Spain as counsel for a British firm in certain suits instituted before Spanish tribunals. While walking one evening in the public gardens of Lorca he was suddenly attacked by an infuriated mob for apparently no reason whatever. The pretext of the outrage was some fearful and barbarous superstition. Mr. Jencken was finally rescued after having been severely wounded. The Spanish government immediately took steps to punish the perpetrators of the outrage. Earl Clarendon, however, in a note dated April 7,

1. 58 Br. & For. St. Pap., 1009

2. *ibid.* 1031 3. *ibid.* 1142

4. 62 *ibid.*





1870 1. pointed out that Mr. Jencken had ventured to Lorca on professional duty, and was therefore entitled to rely on the authorities of the place for protection, a duty which they had failed to perform. In view of these facts he thought some pecuniary compensation would be proper for the severe and unmerited sufferings of Mr. Jencken.

After some delay the Spanish government replied that it had punished all the criminals, but as the offended party had conclusively renounced indemnity in the local court, that the government did not see any grounds for making compensation. 2.

These cases must suffice us for the present in regard to British claims against other nations. Let us next ascertain the attitude of Great Britain in cases involving her responsibility for acts of British subjects affecting aliens.

An important case, known as the Fortune Bay case, came up before the foreign offices of the United States and Great Britain in the year 1878. The facts were as follows: 3. A number of American fishing vessels while fishing upon a Sunday in Fortune Bay, Newfoundland were attacked by native fishermen who destroyed their cargoes, boats and nets and expelled them from the bay. The Americans claimed that they were fishing within the limits and privileges granted them by the Treaty of Washington of 1871 and that the stipulations of this treaty could not be abridged by local legislation which prohibited Sunday fishing. The United States minister in London was instructed to present to the British government the

1. 62 *ibid.* 985 2. 62 *ibid.* 1000-2. The Spanish law as we have seen provides that indemnification in cases of mob violence shall be made by the assailants. This may explain the fact why Mr. Jencken did not press his claim in local courts. 3. 1878-81 *For. Rel. Correspondence with Great Britain.*





demands for indemnity which amounted to 105, 305. 02. The British government contended that in as much as the treaty granted only the right to fish in common with British subjects. 1. The Americans by violating the Newfoundland law, and hence exceeding their privileges, had no just ground for complaint. 2. The United States government took the ground that local law could not be admitted to limit or define treaty privilege, but that irrespective of this question compensation was due for the violence suffered. 3.

In a note dated October 27, 1880 Earl Granville fully recognized the contentions of the United States government in regard to the second point mentioned above.

'In the first place,' he wrote, 'I desire that there should be no possibility of misconception as to the views entertained by her Majesty's government respecting the conduct of the Newfoundland fishermen in destroying or damaging some of their nets. Her Majesty's government have no hesitation in admitting that this proceeding was quite indefensible and is much to be regretted. No sense of injury could under the circumstances justify the British fishermen in taking the law into their own hands and committing acts of violence....As regards the claim of the United States fishermen to compensation for injuries and losses which they are alleged to have sustained..., I have to state that Her Majesty's government are quite willing that they should be indemnified for any injuries and losses which upon a joint inquiry may be found to have been sustained by them and in respect of which they are reasonably entitled to compensation.' 4.

Early in 1881 the British government settled the claim by the payment of 15,000 pounds which included the settlement of certain other claims which had arisen previously. 5.

The Fortune Bay case presents several interesting points which differentiate it from the preceding cases. In the first place we have here to deal with non domiciled aliens, and secondly with a case in which the violence suffered took place in territorial waters. 1. Art. XVIII of Treaty of Wash., Malloy, 738 2. 72 Br. & For. 1267 et seq. 3. 1878 For. Rel. 308 et seq. 4. 72 Br. & For. 1298 ff 5. 1881 For. Rel. 509



Moreover the case has to do chiefly with interpretation of a treaty, and it is perhaps this fact, coupled with the peculiar circumstances under which the dispute arose, that led Great Britain to acknowledge so freely her responsibility and to accord indemnity.

To sum up the facts which we have ascertained relative to Great Britain's position concerning questions of responsibility for mob violence and civil wars. In the first place, the British government has maintained a consistent practice in regard to making claims against other countries, despite the fact that there has been a decided opposition to such a practice on the part of the text writers.

1. In the second place Great Britain has never failed to indemnify those countries which claimed her responsibility for acts of her subjects, though she has always rather grudgingly admitted such responsibility. On no occasion has she accorded indemnity out of 'motives of spontaneous liberality', a term which so many countries employ when the payment of such an indemnity seems inconsistent with the general theories held by them. On the whole, as we have already said, Great Britain has coordinated theory and practice far more consistently than have the majority of states and she has thereby helped to point the way to a more creditable practice among civilized nations.

Turning to Germany we find that the German view concerning responsibility is practically identical with that of Great Britain. Several cases in which Germany was concerned seem to confirm this view. Unfortunately for our purpose I have been unable to find any instance in which a state claimed the responsibility of the

1. Thus Hall, Oppenheim and others cf. Chapter II of this paper.





German government for acts of insurrectionists or rioters. This fact is due not only the comparatively recent establishment of the German Empire but also to the basic elements of the German national character. The German is essentially a law-abiding person, and this fact in itself explains the absence of outrages within the confines of Germany such as the United States has had to cope with.

Early in 1876 the first case of responsibility for mob violence came up before the German foreign office. This affair was the celebrated 'Salonica Incident' which precipitated the outbreak of hostilities between Turkey and the states of the Balkans. The disturbances originated in the following manner. 1. A Bulgarian girl was on her way to Salonica to declare her intention of embracing the Mohammedan religion. Her mother who was opposed to this met her by chance on the train and succeeded in persuading several Christians to assist her in preventing the girl from carrying out her intention. Upon their arrival at the station of Salonica, the Christians aided by some of the bystanders attacked the police who had met the girl at the station, seized the latter and took her to the American consulate. The American consul was absent at that time. 2. These incidents occurred on the evening of the fifth of May. The Bulgarian girl and her mother remained at the consulate overnight and left next morning.

The same morning some Mohammedans called on the Pasha and insisted that the girl be brought to the Governor's house. The girl was nowhere to be found. The Turks threatened to attack the American consulate, and proceeded to the mosque where other Mohammedans

1. Staatsarchiv, v. 30, p. 333 et sq., v. 33, p. 108 2. The American consul was unjustly accused of having taken part in the affray. cf. 1876 For. Rel. 569 et sq.



had assembled. They were all armed and ready for the attack. About this time, M. Moulin, the French consul, and Mr. Henry Abbott, the German consul passed by the mosque on their way to the Grand Council to intercede in behalf of the girl. They were surrounded and compelled to enter the mosque. While attempts were being made to find the girl the crowd became more and more furious and finally attacked the consuls. With bars of iron wrenched from the windows they ruthlessly murdered the two men. The girl was finally found and appeared on the scene a few minutes after the outrage. Upon her appearance the mob dispersed.

The German and French governments immediately demanded reparation for the murder of their consuls. The Turkish government forthwith admitted its responsibility, and dispatched a commission of inquiry to Salonica. The perpetrators were tried and condemned and the consuls were buried with full honors. An indemnity of 300,000 francs was paid to the widow of Mr. Abbott and 600,000 francs to the widow and children of M. Moulin. The critical conditions then prevailing in the Turkish capital explain to a certain extent the alacrity with which Turkey settled the case.

The Salonica Incident aroused considerable excitement not only in the countries directly affected but also in Great Britain and in the United States. In Great Britain, because the German consul was a British subject and for this reason the British government seconded the German claims with a good deal of spirit. The United States was concerned on account of the unjust accusations made against the American consul.

The point might be raised here that the reasons why Turkey so promptly assumed the responsibility for the murder of the two consuls was on account of their official character. But this view is



not quite correct. We must remember that consuls do not enjoy the privileges and inviolability of ministers of state. As Mr. Jefferson pointed out in 1791, 'Independently of - a special- law, consuls are to be considered as distinguished foreigners dignified by a commission from their sovereign...' 1. They are dimply entitled to especial respect from the country in which they reside. It must be borne in mind, moreover, that the attack upon the German and French consuls was palpably an attack upon them, not as consuls or representatives of any particular state or nationality, but because they were Christians.

In this connection it may not be out of place to suggest an amendment to the rules of the Institute of International Law relating to the responsibility of states for injuries sustained by aliens. As we have already pointed out 2. Article I, Sec. A of the rules voted by the Institute provides that aliens are entitled to an indemnity 'When the acts from which they suffered were directed against them as aliens or against them as representatives of a particular state.' The suggestion for amendment which we would offer is that the words 'or as the adherents of any religious faith or sect', be added. 3. The rule would then cover a multitude of cases where Christian missionaries have been victims of outrages cases which deserve to be prosecuted more vigorously than those in which ordinary domiciled aliens are concerned, and which frequently would not be included in the rules as they stand.

But returning to our study of the German position in regard to responsibility we proceed next to examine the facts in the first of the secalled 'Casablanca Inciden's'.

1. Moore, V, 33 2. Chapt. III of present paper. 3. This would not protect, however, such sects as are prohibited a country by its municipal law.





The months following the signing of the Algiciras Acts found Morocco in a rather ~~t~~ubulent state. On July 30, 1907 nine Europeans in Casablanca were murdered by the Moors. They were laborers employed in constructing a railroad between the quarries and the pier at Casablanca and were of French, Italian and Spanish nationality. Mouley Amin, the Sultan's uncle assumed command and restored quiet in the town. Meanwhile the French cruiser Galillée had been dispatched to the scene, and on August 6 had landed a small and inadequate force of marines to protect the foreigners in the city, much against the wishes of the various consuls who realized that this action might cause the Moors to break out afresh against the unbelievers. The fears of the consuls were realized. A riot broke forth among the inhabitants of the city and the wild tribes from the hills poured down into the streets. At this juncture the Galillée opened fire on the town, and when the French and Spanish reinforcing fleets arrived the French vessels of the squadron continued the bombardment. The loss of life and property suffered was considerable, for the town was practically wiped out.<sup>1.</sup>

The German interests in Casablanca were considerable and within a short time the French government was requested to make reparation for the injuries suffered. At a meeting of the French cabinet the ministers decided on the issuance of the following note: 2.

The ministers have considered the question of indemnities claimed by the families of the laborers murdered July 30 at Casablanca, and by those persons injured by the inhabitants while pillaging the city or by the suppression of the disorders. They have examined the precedents, particularly those relating to the bombardment of Alexandria in 1882 and have come

<sup>1.</sup> For a more extensive account cf. I. Am. Jour. Int. Law, 976. Also Archives Diplomatiques 272 <sup>2.</sup> 34 Jour. Privé, 1257



to the following conclusions:

1. The government of Morocco must be held responsible for the murders of July 30, as well as the injuries resulting from the plundering and from the suppression of the disorders.

2. That the indemnities due for material injuries must be fixed by a commission of inquiry.

The minister of Foreign Affairs has been charged with completing the examination of the question and with applying these regulations as nearly as possible.

1.

In the Casablanca Incident, we have extraneous elements and influences upon the responsible government, so that it was constrained to acknowledge its responsibility, for here the political situation was such that France was practically compelled under the terms of the Algiciras Acts and by the exigencies of her foreign policy to assume the responsibility for the insurrection of July. It is doubtful if under different circumstances the French would have been as amenable to German claims. 2.

The two cases which we have just considered must suffice for the present in regard to Germany's position in the question of responsibility. Later when we come to examine the Venezuelan intervention in 1902 and the intervention in China in 1900 as a result of the Boxer troubles we shall find that Germany's position was no less well defined. Fortunately for Germany she has as yet been free from all claims against herself in questions which concern her responsibility. It remains to be seen whether she will maintain the advanced stand which she has taken in the solution of these problems, when she is confronted with claims involving her own responsibility.

1. On Nov. 11, 1907 the German commission fixed the amount of indemnity at 978,576 marks. cf. 107 Arch. Dip. 276. The claims commission settled the question on Jan. 24, 1910 by allowing 13,069,642 fr. 57. This included claims of other countries. 113 Arch. Dip. 315 2. Dupuis, 463 ff., Marten, 238





Up to this point in the discussion we have dealt exclusively with questions of international law, the municipal laws of countries having merely an incidental effect upon our problems, as e.g. the regulations for voting indemnities. When we turn to France we find in the matter of responsibility that the municipal law and the international law have a much closer interrelation than in any other country, for in addition to the responsibility of the state, we have the communal responsibility which for some time was of considerable importance in French international relations. We have already seen that the law relating to communal responsibility had been declared by the courts shortly after the French Revolution to be inapplicable to cities of the size of Paris. This decision practically put an end to the entering of claims in the local courts and left the matter to diplomatic negotiation. The difficulties which accompany such a course, were, however, obviated by the passage of a special law on August 30, 1830 which placed at the disposal of the government the sum of 2,000,000francs for the claims arising out of the events of the revolution of that year. It is a noteworthy fact that this sum was designated as secours or aid.

1.

The indemnifications furnished by France for injuries resulting from the disorders of 1848 were similarly motivated. By a decree of the president of the republic on December 24, 1851 a special fund of 5,600,000francs was created to settle the claims which had arisen. The decree especially pointed out, however, that the state was under no legal obligation to <sup>do</sup> this, but that it was acting thus in conformity with the principles of justice and political safety.

2.



The problems which arose in the year 1871 were of an entirely different nature from those in the preceding revolutions. Here the losses incident to the Prussian war were scarcely to be distinguished from those resulting from the excesses of the communist régime. One of the first acts of the national assembly had been to authorize an investigation by a special commission of the losses in the various departments invaded, at the same time the minister of the interior requested the various prefects to make an estimate of the losses sustained. The commission of the Assembly reported damages to the extent of 821,087,980 fr. as contrasted with the 666,647,799.52 fr. of the prefects report. 1. Final revision determined the sum of the losses sustained to be 658,598,430 fr. 62. This was exclusive of the 2,000,000 fr. contribution of Paris to the war.

The national assembly by the law of Sept. 6, 1871 voted the sum of 100,000,000 to be distributed pro rata among the various departments. This sum was supplemented in the year 1873 by an additional appropriation of 120 million to the departments and 140 millions to the city of Paris. Finally in 1874 the sum of 50,000 fr. completed the total indemnity voted.

Strange as it may seem the National Assembly made no attempt to differentiate between the injuries and losses resulting from the foreign war and those of the civil war. Not only was this true, but the claims of aliens were put on the same basis as those of the nationals. 2. In the payment of all of the various claims, however, the budget commission declared that there was no intention to create a right to an indemnity nor to sanction a debt of the state. Nevertheless, the violence attending the reconquest of  
 1. Calvo III, 152 2. ibid. 154



Paris by the troops of the regular government during the communist insurrection gave rise to claims which were distinctly declared to be debts of the state, in view of the fact that Paris was not communally responsible. 1. There was no mention of the fact that the indemnities were acts of spontaneous liberality.

The three cases which we have examined bring the development of the theory of responsibility in France down to the year 1870, but the most decisive development of the theory has taken place since that date. Before we proceed, however, with the more recent developments let us briefly consider a case which <sup>arose</sup> in the year 1868 just prior to the founding of the third republic. 2.

Free entrance to the cities of Osaka and Sakae had been granted by Japan in a treaty with France. The approach to Osaka which had heretofore been used was found to be dangerous and the corvette Dupleix was commissioned to make soundings. The next day news came that the steam launch of the Dupleix had been attacked by a mob and that everyone on board had been either killed, wounded or had disappeared. The consuls of the powers incensed at the news of the outrage withdrew from Osaka. The first reports were subsequently confirmed by the two sole survivors of the massacre.

The Japanese government immediately acknowledged its responsibility and returned the bodies of the murdered men. 'They recognized the fact that our men were exempt from all blame; that the massacre was without possible excuse; and that a signal punishment was necessary.' 3.

1. These acts were regarded as fait de prince, the result of vis vaioir 2. For facts cf. Staatsarchiv, 16, p. 119 et sq.; Arch. Dip. Ser 1, 33-4 3. Dispatch of Min. Roches. Staatsarchiv, 16, 121





The Japanese government carried out their promises. Three officials and 17 Samurai implicated in the outrage were executed, and official excuses were read on board the Dupleix by a prince of the royal house. The government further paid the sum of 150,000 piasters as an indemnity to the families of the murdered men.

It is clear from this case and from the other cases involving French nationals abroad, which we have already examined, that whatever the views of the French government on the question of indemnities as acts of 'spontaneous liberality' in her internal policy, in her relations with other nations in regard to her own subjects, this was a principle which she little favored. She was again brought out in the questions arising from the Carlist Rebellion of the seventies. 1.

The Carlist and cantonal rebellions are too recent to require any detailed discussion. The events which drove Queen Isabella of Spain from her realm in the year 1808 produced a multitude of claimants to the throne and for the next five or six years Spain was the seat of the worst internal strife. The party supporting Alfonso son of the later queen finally emerged successfully after a vigorous campaign against the adherents of Don Carlos in the North, and the Cantonists or Republicans in the South.

The Carlist forces had operated from the vicinity of the French border and the injuries to French subjects settled in these regions was considerable. France requested the Spanish government that reparation be made for the injuries sustained. The Spanish government was, at first, not constrained to do so, in view of the

1. For facts of rebellion cf. Camb. Mod. Hist., XII, 258 et sq.



law in Spain which provides that persons injured in an uprising or riot may sue the perpetrators of such violence for damages. Settlement was finally made in consideration of a cross payment by France for injuries sustained by Spanish subjects in Algeria. A special law was passed by the Cortes Mar. 14, 1883 which gave the Spanish minister extraordinary credit of 300,000 pesetas to indemnify French losses. 2.

In this connection it may not be out of place to examine the Spanish claims against France for the disorders in Algeria. 3.

In the month of June 1881 Spanish colonists settled in Saida in the province of South Oran, Algeria were the victims of the incursions of the Arabs, under the leadership of Bon-Amerna. The loss of life and property was considerable. The Spanish government immediately entered claims for indemnity M. Barthélemy-Saint Hilaire, minister of Foreign Affairs, replied that the

French government had grave reasons for following the events in South Oran with solicitude but that in cases of this sort, the government had never distinguished between nationals and aliens, that aliens enjoyed the same benefits from measures of reparation as nationals. Furthermore he declared 'that measures of reparation evidently could not proceed from a legal obligation.' The events in Saida were to be classed among those inevitable happenings to which the inhabitants are exposed as for instance the devastations of a plague, events which could not engage the responsibility of a state'. 3. He went on to state that the Spanish government

1.Arch. Dip., p. 120 also V. Pr. 1888, p. 293 2.Arch. Dip., 1882-83, III, p. 57 et sq. I R.D.I., 177 3.Arch. Dip., ser. 2, v. 7, p. 59



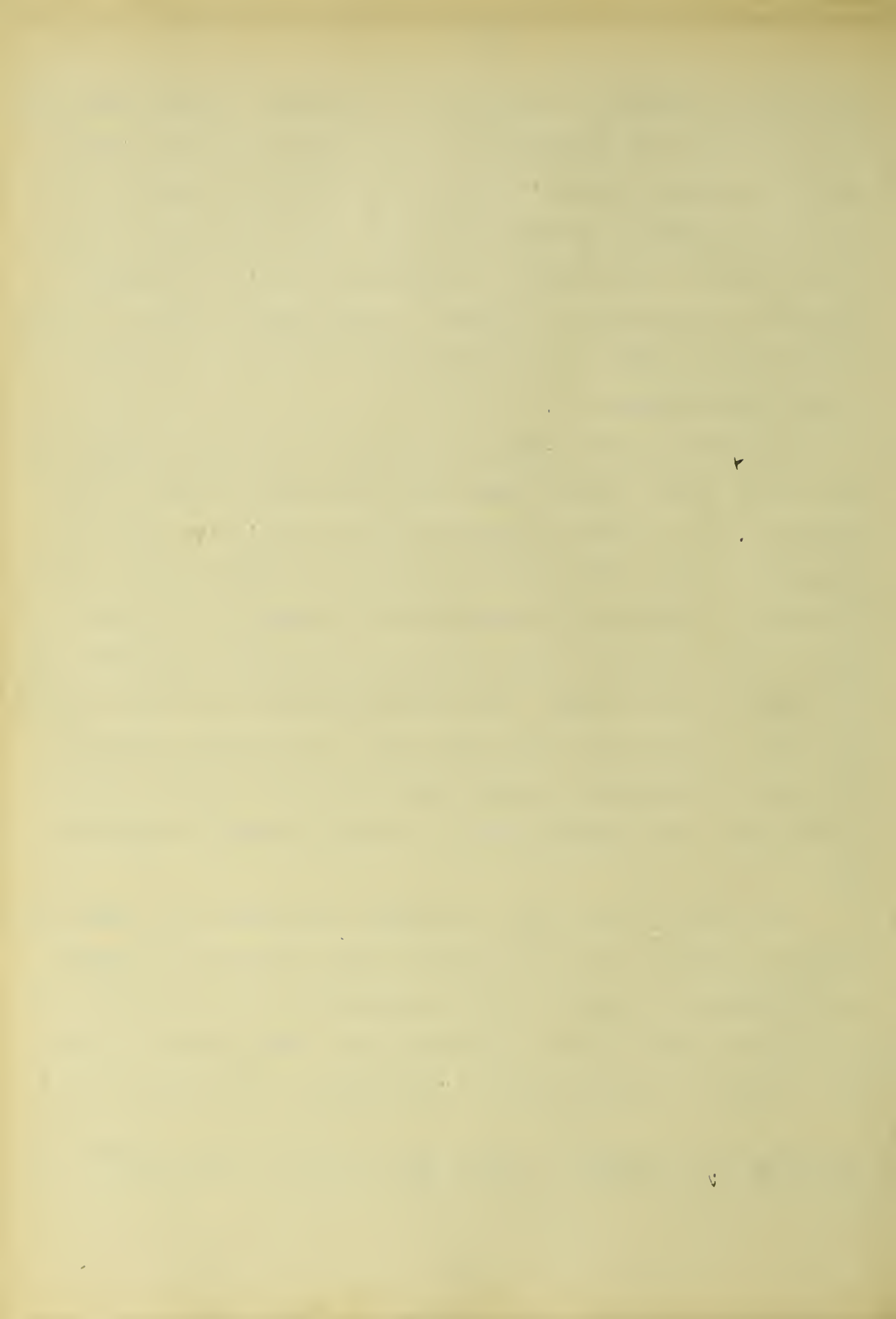


had recently denied her obligation to indemnify injuries resulting from civil war and insurrection on the basis of the same 'universally consecrated theory.' It was not surprising therefore that the French government should act on the same principles of international law. Nevertheless he signified France's willingness to indemnify the Spaniards if similar concessions were made in regard to the French claims for injuries sustained during the Carlist and Cuban insurrections. 1.

M. Barthéllmy-Saint-Hilaire neglected to mention however that the French claims against Spain which had been the first to be presented, had not been in accordance with the 'universally consecrated theory.' The Spanish government protested against his view not on the basis of this principle, however, but on the ground that the facts in the two cases were widely different, that no analogy could be drawn. The French government in reply pointed out that in practical effect there was no difference whatsoever, and after considerable correspondence the mutual payments were agreed upon. The indemnity paid by France amounted to 900,000 fr. 2.

The position into which the French government was forced is a striking example of the inconsistent policy which many powerful states pursue in regard to the responsibility of other states for the injuries sustained by their nationals. When France in 1893 was informed by Brazil that the 'universally consecrated theory'

1. Cuba was in a state of revolt during the 70's Large indemnities were paid out by Spain. 2. Arch. Dip., ser. 2, v. 7, p. 71



would prevent the payment of indemnities for civil war, France protested very vigorously and finally compelled payment. In the same year the celebrated 'Aigles Mortes Affair' took place and France faced a rather heavy bill of claims. No mention however was made of the 'universally consecrated theory'.

Aigles Mortes <sup>1</sup>. a small town near Marseilles was the scene of a very violent outbreak of race prejudice. The compagnie des Sabins du Midi employed a number of French and Italian laborers in its works. On August 17, 1893 these workmen engaged in a quarrel in the course of which the greater part of the population of the town participated, until there ensued a veritable pitched battle. A number of Frenchmen were wounded, but of the Italians 7 were killed and 26 wounded. Order was restored by the arrival of regular troops.

The question arose upon whom the blame was to be placed, but this was never satisfactorily elucidated. The root of the whole trouble seems to have been that the company employed a preponderating number of Italians.

The day after the riot M. Ressaian the Italian ambassador to France presented his 'remonstrances' to the French minister of Foreign affairs who expressed his deep regret and added that prosecution of the offenders had been instituted. But the more important question of reparation was still to be settled. Before we proceed with the discussion of this problem let us briefly survey the events in Italy which took place on the days following the riots at Aigles Mortes. <sup>2</sup>.

<sup>1</sup>. I, R.D.I. p. 171 <sup>2</sup>. ibid. 173; Archiv. Dip., ser 2, v. 49, p. 37 ff.





The Italian disturbances were as distinctly anti-French in character as the Aignes Mortes affair had been anti-Italian, but they were far less serious in result. In the main, the activities of the Italians were confined to hostile demonstrations against the French in Rome, Naples and Genoa . In Rome a mob assembled in front of the French embassy and in spite of the active resistance of the police, hurled stones and blazing papers into the palace. In Naples and Genoa the consulates were attacked, business houses of French merchants had their windows broken, and the cars of the French street car lines were derailed and burned.

Claims for indemnity were first presented by the Italian government. On August 22 the Minister of Foreign Affairs of Italy telegraphed the ambassador at Paris that the reparation by France would be complete when a just indemnity was accorded the victims of the Agnes Mortes affair. Before this dispatch had been communicated, however, the French government of its own accord offered to pay an indemnity. This was later affirmed by M. Casimirs-Perie in a note of the 11th. of December, 1893, **1.** declaring that the government was willing to do this as a 'pensée d' humanité'. No mention of non-responsibility was made and the offer was accepted by the Italian government.

The French merchants who had been injured in the Italian riots presented their claims early in October **2.** The sum of their demands amounted to 50,000 fr. as compared with the Italian claims of 420,000 fr. A joint commission was appointed to examine all the claims but after a short sitting it dissolved without coming

**1.** Archiv. loc. cit. p. 45 **2.** ibid. p. 43





to any definite conclusions. After considerable correspondence, the matter was settled entirely through regular diplomatic channels and the amounts mentioned above were paid. 1.

But little comment on this case is necessary. It clearly falls under the general head of injuries done to aliens on account of their nationality, injuries which now are universally considered as giving rise to indemnification. This principle, moreover, as we have already seen has been adopted in rules of the Institute of International Law relating to the responsibility of states for injuries sustained by aliens. The action of both the Italian and French governments was very creditable in the affair and set a precedent that other nations could well afford to follow. It is worth noting that the 'spontaneous generosity' phrase is conspicuous by its absence in all of the correspondence. 2.

Since the Aignes Mortes affair France has not been involved in any important questions of responsibility, with the possible exception of the Boxer troubles, until the outbreaks in Spain known as the Barcelona riots which took place in the year 1909. The fact that this is the most recent case in which the question of responsibility for injuries to aliens has arisen makes it worth our while to consider the facts and the opinions with especial care.

The Spanish crisis in 1909 was brought about by the war policy of the government in Morocco. Public sentiment in Spain was decidedly opposed to the pursuance of hostilities in Africa, and when

1. *ibid.*, 47-8 2. On writer I R.D.I. p. 174 misinterprets the use of the word spontanement. As I understand it, it refers to the spontaneous action of the government in according indemnity in contrast to such an indemnity being the result of pressure by the claimant state



the attempt was made to mobilize troops popular dissatisfaction manifested itself in strikes, riots, insurrections and all the concomitant excesses of mob passion. These disturbances assumed a most critical aspect in Barcelona and Catalonia. In Catalonia the outbreak was decidedly anticlerical in character but in Barcelona, a hot-bed of political fanatics the riots broke forth with unbridled fury. This city, had been for generations the rendezvous of anarchist, and the success of these agitators left the results of the fight for the time in doubt. The uprisings were finally quelled, but only after a considerable loss of life and property.

The important French interests in Barcelona naturally had suffered considerably and it was not long before the question of the responsibility of the Spanish government was raised. We have already seen that the peculiarity of the Spanish law relating to indemnities is such as to practically render the use of diplomatic channels unavailable to claimants. Exceptions to the rule occurred at the time of the War of Independence and again in 1833, 1840, 1842 and 1863 <sup>1.</sup> when special laws provided indemnity. In 1875 a decree of June 10 provided that the property of Carlist insurgents should be confiscated to provide indemnities, but few persons were benefited by this decree. As we have already seen a special law indemnified the French only who had been injured during the course of the rebellion.

The indemnities demanded by France for the Barcelona riots comprised claims both for injuries inflicted by the insurgents and by the royal troops in suppressing the disorders. For the burning

<sup>1.</sup> 37 Jour. Privé, 1139





of a monastery the sum of 80,638 pesetas was demanded and another claim for a similar outrage amounted to 87,379. There were five or six other claims the smallest of which amounted to 6,500 pesetas

1. The whole difficulty in making settlement rested on the fact that the Barcelona insurgents were laborers and insolvents from whom no damages could possibly be exacted.

During the course of the debate on the budget of the Ministry of Foreign Affairs on Dec. 24, 1908 the ministry was interpellated concerning the progress of the reclamation against Spain. After stating the facts in the situation M. Stephan P<sup>i</sup>chon, Minister of Foreign Affairs went on to say 2.

That as has already been shown, there exists no international jurisprudence in regard to the responsibility of states when events occur in civil or political troubles. The law varies with the state. Certain states recognize responsibility, others do not. In Spain there is a system of double legislation. When aliens complain of the acts of insurgents the latter are responsible with their property. However, legislation has decided that only the property of those who have been convicted of sedition are responsible for injuries sustained.' 3.

The opinion of M. Pichon is very clear in its delineation of the present situation of the question of responsibility. The course which has been chosen by France is one evidently favorable to the theory of responsibility. In the cases we have examined, and the list is practically exhaustive, there has been no instance of refusal of indemnity although perhaps in the case of the Spanish claims of 1883 we have the nearest approach to a refusal. In addi-

1. 37 J. Pr. 1140 2. *ibid.* 3. In Sep. 1910 the question of responsibility was still in the sphere of diplomatic action - 37 J. Pr. 1141



tion to the fact that France has been favorable to the theory of responsibility we find that her practice has been uniformly consistent not only in regard to claims for injuries sustained by her own citizens but in her treatment of the subjects of other nations.

In our study of the numerous cases cited in this chapter we have found that there has been a growing tendency among the great powers to admit the validity of the theory of responsibility. In the case of Great Britain we found that this tendency was pronounced as early as 1830 but that in France it has become clearly established only since the year 1890, although up to that time the practice was decidedly in favor of the theory if the payment of indemnities may be taken as a criterion. Germany has in its brief history as an empire maintained a similar stand in favor of the theory of responsibility. We have already seen in numerous instances that the practice of the other European states is similar to that of the three great powers whose practice we have more closely examined. Let us briefly consider a few cases involving the smaller states of Europe, that we may ascertain the extent to which the theory of responsibility is prevalent in Europe at large.

Italy's stand in the Aignes Mortes affair has been the position which she has occupied consistently in all questions where claims of her responsibility for acts of her citizens affecting aliens have been made and likewise in all instances when she herself has claimed indemnities. This we shall see even more clearly when we come to the study of the situation in South America and in the United States. A recent case arose in Crete where an Italian soldier was killed. 1.

1. 13 R.D. p. 223. The soldier was evidently not on duty.





During the election troubles which took place at Cambaru in January 1906 an affray took place in which a soldier belonging to the Italian occupying force was so severely injured that he expired soon afterwards. The representative of Italy in Crete immediately ordered the occupation of the region where the outrage had occurred, and claimed an indemnity from the Cretan government for the family of the victim, and to this end, ordered the sequestration of the customs duties in the region under Italian protection. Under such pressure the Cretan government hastened to comply with the demands of Italy. On the 8th. of February, 1906, it paid the sum of 20,000 by way of separation and the sequestration of customs was raised.

The cases relating to Spain which we have discussed may be taken as a criterion for judging the Spanish views on responsibility. When we come to study the practice of the United States we shall find more confirmatory evidence. An interesting case has recently arisen in regard to responsibility of Spain for the acts of insurgents in the Cuban civil war. 1. Shortly after the Hispano-American war, England, France and Germany presented to the Spanish government claims for injuries suffered by their nationals in the course of the civil war in Cuba. The Spanish government replied that a nation could not be obliged indemnities except for acts of government forces.

During the last two insurrections in Cuba the injuries to property had been committed chiefly by the insurgents. The large Spanish army had been unable to prevent these excesses. The claimant governments recognized this fact and although they pre-

1. 39 Jour. Privé 675





sented their claims to the Cuban government they contended that Spain should share the brunt of the burden, because many of the injuries were the result of the outrages of government troops. The case against Cuba was reasonably clear. It was a notorious fact that much of the depredation had been from the acts of insurgents and later by the forces of the republic.

In 1912 the three governments presented claims amounting to 110,000,000fr. some of which had been pending for over 30 years. No action has as yet been taken. Cases involving Russian subjects have been very few, although within the last 10 years there have been two instances, one in which claims were made against Russia, and another where claims were made by Russia against another state. These two cases which we shall next consider are a striking illustration of M. Calvo's contention that the theory of responsibility favors the powerful, but is prejudicial to weaker nations.

In the year 1905 the Swiss federal council announced that their claim for the indemnification of a Swiss citizen injured in the disorders in Russia of the same year had been repudiated by the Russian government. 1. The Russian minister of Foreign Affairs had replied in the following terms,

The imperial government could not assume the liability for the indemnification of the Swiss citizen injured. In short injuries of this sort occasioned either by individuals or bodies of individuals should be reimbursed by the persons recognized as the guilty parties by competent judicial authority. It is generally understood that this principle does not exclude the responsibility of functionaries who might be convicted for neglect of duty in regard to the suppression of disorders. Consequently the aliens injured have full and entire right of instituting actions against each individual or official whom they believed to be guilty, without the imperial government as such guaranteeing indemnification to injured aliens. In view of these ideas the latter cannot pretend to enjoy privileges Russian subjects themselves are not entitled to.



Russia was clearly inclined toward the view that the whole question of responsibility was one which fell in the field of municipal law alone at least as regarded claims against her. Switzerland was too weak and insignificant a country to be able to press her demands. In regard to the claims of her own citizens, the policy of Russia has been more generous. The following quotation from the *Journal de droit International Privé* for 1912 will suffice as an illustration. 1.

The Prince Salar ed daouleh who occupied New Kermanchah paid at the request of the consul of Russia 7000 tomeins as indemnity to Russian subjects for injuries sustained by them during the disorders in that city.

Fortunately for the theory of responsibility such supporting evidence for M. Calvo's view is becoming less frequent. The development which the theory of responsibility has undergone in the European states during the nineteenth century has not been a very rapid one, for as we have already seen the most important changes have been since the Franco Prussian war. Fortunately too the states in their practice of according indemnities are coordinating theory and practice to a much greater degree than was the custom earlier in the century. Another important phase in the development has been the fact that responsibility is gradually being recognized to be a matter of international and not of municipal law, and gradually the adherence to the old view is becoming less. The example set by the European states has really determined the fate of the theory of responsibility, for its reception has been





less favorable in the Americas from the international point of view, but from the point of view of international practice, a ponderous mass of evidence has been piled up in favor of the adherents of international responsibility. And, after all, it is the weight of precedent and practice which is the determining factor as to what is and what is not international law.



## Chapter IV

## The Practice of The Latin American States.

In our study of the conditions in Europe, we came to the conclusion, and justly, that the status of the theory of international responsibility is gradually becoming more clearly defined in regard to the relations of the European states with each other and with the United States. When we turn to the Latin American states, however, the situation changes and our verdict is likely to be less sanguine. Here the status of the theory of responsibility may best be described as chaotic.

The state of affairs in South and Central America recalls the famous words of Jefferson, that the state which arose in revolution will live in revolution and will pass away in revolution. We cannot consider these revolutions as frivolous and sporadic outbreaks, as they are frequently pictured to be, but they often assume a very formidable aspect. Thus we have the Venezuelan Revolutions of 1870 and 1892, the Columbian Revolution of 1870 and the Brazil Revolution of 1893 which gave rise to lengthy and acrid disputes. The injuries which were sustained by aliens in these insurrections are typical of the sort of thing which constantly occurs in the Latin American revolutions. The flagrant disregard of life and property has justified the vigorous measures taken by the European governments to protect their nationals, and confirms the view which these governments hold that the Latin American



states have not yet reached such a high degree of civilization as to trust the destiny of foreigners in their hands. On the other hand, there has been a decided abuse of their position by the European powers and a misuse of diplomatic intervention in favor of nationals for supposed injuries. It is actions of this sort which in turn justify to a certain extent the views of M. Calvo, and the attempts of the Latin American states to avoid ~~the~~ responsibility for aliens.

The claims which are most frequently made against the South American states are ~~most~~ conveniently divided into three classes. First, claims made for injuries arising from acts of oppression, unjust imprisonment or mob violence. Secondly, claims for injuries sustained during civil wars and insurrections. Thirdly, claims made for violations of contract obligations. It is with the first two classes alone that we shall have to do.

In order to avoid the liability for injuries to aliens, the Latin American states have adopted every conceivable method, but to all appearances, to no avail. They have repudiated the theory of responsibility not only in their diplomatic correspondence, but in their statutes, their treaties, and even in their constitutions. From a political point of view this position which the Latin American republics have assumed may be regarded as a protest against indiscriminate intervention by European states, whether this be diplomatic or armed intervention. It is an effort, moreover, to maintain the principles of the equality of states and the inviolability of territorial sovereignty. From the juridical standpoint, however, we see in this attempt of the Latin American states to repudiate the theory of responsibility, a final effort





to regulate the responsibility of states by municipal legislation. From this point of view it is, therefore, to a certain degree comparable with the system of internal regulation in France, in Spain and other European countries.

Although it is the purpose of the present paper to study simply the question of the international responsibility of states for injuries sustained by aliens and the problems arising therefrom, nevertheless, the interrelation of the municipal and international law on this subject is so close in the Latin American states that it becomes necessary for us to examine with great care, the efforts made by these states to avoid responsibility. These attempts take the form of regulation of the rights of foreigners, first by constitutional provisions, secondly by statutory provision or special decree, and lastly by treaty stipulations. Let us consider in the first place, the constitutional regulations of the liability of a state for injuries sustained by aliens.

The constitutional limitations of the rights of aliens may be divided into two distinct types of regulation, those provisions which prohibit reclamations of any sort, or limit diplomatic intervention to cases of denial of justice, and those provisions which guaranty to aliens nothing more than equal privileges with nationals. The earliest of the provisions limiting international reclamations is to be found in the Costa Rican constitution of 1871, article 46. It is one of the least reactionary in character and does nothing more than limit claims of aliens to the municipal courts. The provision is as follows: 1.

Act 46. Costa Ricans or foreigners shall seek redress



for injury or damages done to their property, or honor before the courts. Justice shall be administered to them promptly, fully without denial and in strict conformity with the laws.

It is evident that this provision is pretty general in character and was not directed against diplomatic reclamation alone. In contrast to this provision, however, is the article from the Guatemala constitution of 1879, which provides that

Neither Guatemalans nor foreigners shall have indemnification for damages arising out of injuries done to their persons or property by revolutionists. 1.

This was the first concise constitutional denial of the right of aliens to indemnification for revolutionary outrages, and was embodied in the Salvador constitution seven years later. The provision in the Salvador constitution differs slightly from the Guatemala article in that it gives the injured party the right to sue for damages. It reads as follows: 2.

Neither Salvadoreans nor aliens shall have any right to claim in any case from the Government indemnity for damages and injuries done to their persons or property by factions, but they shall be free to sue the guilty parties, whether official or private.

This provision is strengthened by an article -49- which provides that no international compact shall be entered into which would modify in any way the present article. 3. In fact, this is what the Salvadoreans have done, but they have gone even farther, as we shall see, and have strengthened their position by treaty provisions of non-responsibility.

The Central American states had taken the lead in attempting to determine the practice of responsibility by municipal regula-

1. Article 14, Rodriguez, Am. Consts., v. I, p. 238

2. Article 46, Rodriguez, Am. Consts., v. I, p. 268

3. Ibid.





tion, and their example was followed in 1889 by the Republic of Haity, with the adoption of its new constitution. The constitution grants to aliens the same protection as native citizens subject, however, to 'the exceptions established by law'. 1. It denies, however, the right to claim indemnities both to aliens as well as to Haitian citizens. The paragraph which follows is essentially the same as the Salvadorean provisions but broader in its scope:

The injured parties, however, shall have the right if they choose, to prosecute before the courts, according to the law, the individuals recognized as authors of the wrongs perpetrated, and seek in this way the proper legal reparation.

The Haitian Republic was the last country for the next 15 years to incorporate into its constitution provisions limiting the obligation of responsibility. In the year 1904 two countries, Honduras and Venezuela, finally embodied into their fundamental law the principles which they had adhered to for the last 25 years. The provisions of the Venezuelan constitution 2. are identical with provisions in the other constitutions which we have examined and present nothing new. The Honduras provisions, however, are significant for the reason that apart from the fact that they deny the right of nationals or foreigners to make claims for injuries sustained at the hands of revolutionists 3. they further prohibit the use of diplomatic intervention. The latter provision is as follows: 4.

Art. 14. Foreigners shall not present claims against the state or demand the payment by it of any indemnity except in the case and in the manner in which Hondur-

1. Ibid., Art. 185, v. II, p. 85 2. Ibid., Art. 15 & 16, v. I, p. 201 3. Ibid., Art. 142, v. I, p. 388 4. Ibid., Art. 14 & 15, v. I, p. 362



eans may do so. 1.

Art. 15. Foreigners shall not resort to diplomatic intervention except in cases of manifest denial of justice, abnormal delays, or self-evident violation of the principles of international law. The fact that a final decision is not favorable to the claimant shall not be construed as a denial of justice. If in violation of this provision claims are presented, and not amicable adjusted, injury to the government being sustained thereby, the claimant shall lose the right to inhabit the country. 2.

The provisions of the Honduran constitution may be looked upon as the most radical step taken by any of the South American countries. They represent a deliberate attempt to limit and define international rules in regard to diplomatic intervention to an extent never before recognized, and put the alien absolutely at the mercy of the government.

The Honduran articles undoubtedly formed the basis of the stipulations in the Nicaraguan constitution of 1905, which in substance are identical with the former. 3. Responsibility is adroitly denied, and diplomatic intervention is limited to cases of denial of justice. The constitution does not, however, attempt to define denial of justice. Aliens making undue claims forfeit the right of inhabiting the country.

In the last chapter, we came across several instances where responsibility for mob violence or insurrection was, to a certain extent, regulated by the municipal law of the country. Thus we found the Communal and Gemeinde responsibility in France and Germany, and the provisions in England and in Spain. These measures are not, however, measures of external policing but of internal administration. Their international significance was only incidental

1. This provision and article 142 are evidently mutually exclusive. The Hondureans intended to make their constitution rigid if anything. 2. Ibid. v. I, p. 362 3. Ibid., v. I., pp. 301 - 2





and at present may be said to be extinct. In the Latin American states, however, the contrary is true. The constitutional provisions of these countries are directly aimed against the theory of responsibility. They are preeminently measures of external safety. When we consider, however, the state of affairs in the particular states which have embodied these principles of non-responsibility in their constitutions, their modus operandi becomes clear. The names of Venezuela, Guatemala, Salvador, Honduras, Haity, Niceragua and Costa Rica are synomous with insurrection, and it is only this fact in mind that we can understand the reasons for the violent repudiation of responsibility. It is a significant fact, that none of the really great and important states of South America have found it necessary to incorporate such principles into their fundamental law. 1.

The constitutional provisions which we have examined so far, have been a very direct repudiation of responsibility. Other of the Latin American states have adopted similar but less direct means of attaining the desired end through constitutional provisions.

Such provisions, which may be found in the constitutions of Ecuador, 2. Colombia 3., Paraguay 4., Cuba 5., and Panama 6., take the form of stipulations that aliens shall enjoy the same civil rights or constitutional guarantees as nationals. In other words, while the constitution is apparently granting to aliens certain rights, at the same time under the doctrine of implied powers it denies them other rights. Manifestly, the nationals are not entitled to present claims against the government, and they never are, the aliens will be similarly restricted. Provisions of this

1. Argentine, Brazil, Chile, Peru. 2. Ibid., Art. 37, v. II, p. 283 3. Ibid. Art. 11, v. II, p.321 4. Ibid. Art. 33,, v. II, p. 388 5. Ibid., Art. 10, v. II, pp. 144-5 6. Ibid., Art 9, v. I, p.394





sort are deceptive, for, although they seem to be giving extensive rights they are in fact depriving aliens of more essential rights, namely, those which they enjoy under the equally important principle of international law: the protection of nationals abroad.

These constitutional provisions are not to be regarded merely as a codified expression of the view that aliens shall not enjoy greater privileges than nationals. It is true that this is the form of expression, but, as has been indicated, the really significant feature is the implied restrictions which may be deduced from these articles. It is this fact which gives these provisions some international significance.

It is an interesting fact that these constitutional provisions are to be found in those countries which more than any others have been subject to continuous reclamations by foreigners injured in the numerous insurrections. None of the countries which we generally consider as maintaining a more settled political life have embodied rules of this sort into their constitutions. Some of these countries, however, have adopted other means to attain similar ends. Such countries have had recourse to statutory provisions and, most of all, to treaty stipulations. The statutory provisions frequently supplement the constitutional provisions which we have already examined. Let us briefly consider some of the more important of these laws and decrees which seek to deny international responsibility.

A great number of the statutory provisions regulating the reclamations of aliens have been passed as a direct result of some civil war. This has been especially true of Colombia and Venezuela, the latter state being one of the first to adopt this method of



procedure. In the year 1873 at the close of the memorable revolution in Venezuela 1. the reclamations of aliens who had sustained injuries in the course of the insurrection were so numerous that in a vain attempt to deny its responsibility the Venezuelan government issued a decree which established 2.

That neither domiciled foreigners nor wayfarers have a right to resort to diplomatic channels, unless when, having exhausted legal resources before the competent authorities, it may clearly appear there has been a denial of justice or notorious injustice.

Foreigners do not possess the right to demand indemnification from the government for the losses or injuries proceeding from war except in such cases as Venezuelans possess it.

The manifest severity of this law was, however, modified by a further decree issued at the same time, which gave the claimants a fairly wide latitude of reclamation, for the injuries caused by the authorities of the de jure government. 3. This decree is especially noteworthy in that it represents one of the first of the outspoken and forceful attempts on the part of the Latin American states to limit the obligation of responsibility. It has served as a model for future laws and decrees.

Four years after the issuance of this decree, the Colombian government passed a law regulating the rights of claimants who had suffered losses in the recent civil war. 4. This law was slightly more liberal than the Venezuelan decree. It recognized claims proceeding from injuries received at the hands of the revolutionists 5. It provided, however, that these cases were cognizable only by the local courts. As for the claims of foreigners, the law stipu-

1. These cases we shall later examine more closely 2. 74 Br. & For. State Papers, 1065 3. 74 ibid., 1066 4. 68 ibid., 776 5. Except in the province of Antisguia, ibid.,





lated that they should not be treated as foreigners as such, 1. except in respect to property belonging to them, and taken from them.

The British government protested against this law in a note addressed to Colombia on January 3, 1878, 2. and as a result a new law was passed July 1, 1878 which provided that jurisdiction over foreign claims was to be given into the hands of the administrative departments. 3. The law was further amplified by a presidential decree regulating the mode of presentation and substantiation of foreign claims. 4.

The next change in the Colombian law took place in the year 1885 at the end of another revellion. 5. This decree recognized that the problems arising out of this civil war were ones which gave rise to international responsibility. The claims of foreigners who had not forfeited their neutral character were not to be settled by the administrative authorities as had been the case in the previous law, but were to be determined by Mixed Commission. 6. This decree was supplemented in the year 1886 by a law which further provided for the settlement of claims, but especially stipulated that the nation was not necessarily responsible for losses sustained by foreigners at the hands of the rebels. 7. This law was again modified in the next year by an amendatory decree, which interjected the clause which we have just mentioned as establishing the fact that the responsibility of the Republic as concerned the claims of foreigners was not absolute, apparently extending the

1. Ibid., p. 778 2. 68 ibid., 776 3. 69 ibid., 376 4. Ibid.,  
5. 76 ibid., 566 6. Ibid., p. 567 7. 77 ibid., 807, 808. This law was amplified by a presidential decree



limitations of responsibility to acts of officials of the de jure government as well. This decree enumerated the acts of officials for which the Republic would hold itself responsible, but denied its responsibility for the same acts when committed by the rebels except in those cases in which responsibility was found to be recognized by international principles, or was found to be the practice of the civilized world. This latter clause practically nullified the value of the preceeding provisions. 1.

The same year in which these rapid changes in the Colombian law took place found similar additions being made to the law of some of the other Latin American states. Salvador, Costa Rica, Mexico and Equador all enacted comprehensive statutes regulating the status of aliens. The laws all differ from the Colombian statutes in that they were not a direct result of a civil war, although to all intents and purposes their object was likewise to escape responsibility.

All of these laws are very similar to the constitutional provisions which we have already examined. The Salvadorean law 2. provided that aliens should submit to decisions of local tribunals without resorting to remedies which Salvadoreans were not able to employ. The right of diplomatic intervention was limited to cases of denial or wilful delay of justice, and could be resorted to only after all other means had failed. The principles which this law attempted to lay down were denied by both Great Britain and the United States. 3. The United States government pointed out

1. 73 *ibid.*, 53 2. 77 *ibid.*, 121 3. 77 *ibid.*, 116; 78 et seq.





law did not attempt to limit the responsibility of the government for its officials, nevertheless it stipulated that it was responsible for acts of functionairs alone. Diplomatic recourse was not expressly denied, but foreigners were forbidden to resort to any other courses than those provided for Ecuadorians.

The next year, a very comprehensive law regulating the status of foreigners was enacted by the Guatemalan Congress, 1. and a whole section -VI- was devoted to the question of diplomatic intervention. The government would recognize its responsibility for acts of its own officials but on no condition for acts of any other persons without public character. Diplomatic recourse was to be limited to cases of denial of justice, or wilful delay in its administration. Denial of justice was very carefully defined by the same law. 2. There evidently was no protest made against this stature. The foreign powers very probably had found out by this time that these attempts to limit by statute the responsibility of a state had in actual practice but very little significance. To be sure, there would be a protest against reclamation, but the indemnity would invariably be paid. The sole end which such laws attained was to restrict very materially the foreign immigration into the Latin American states.

In 1895 Honduras passed a similar law, although slightly more attenuated in form. The same restrictions were placed upon the

1. 86 *ibid.*, 1281 2. *Ibid.* 1290. This law simply confirmed the principles of the constitution of 1879 where it was provided: 'Neither Guatemalans nor foreigners shall be able in any case to make a claim for indemnity against the government by reason of damages and losses to their persons or goods through the acts of factions.' Protest was made against this, and the Minister of Foreign Relations replied that it was the intention of the government to guard the constitutional precepts in conformity with the general principles of international law. 1880 *ibid.*, 115





right of reclamation and of seeking diplomatic recourse for injuries sustained. 1. No protest was made against this law. A more recent development in the attempt at statutory regulation took place in Venezuela in 1903. 2. The law which was enacted at that time was a part of the whole movement to escape responsibility for the civil war of the previous years, which had culminated in the armed intervention and finally in the constitutional provisions of the Venezuelan constitution of 1904. The right of reclamation is limited to the same extent as in the other statutes which we have examined. The article relating to diplomatic intervention is interesting and is worth while quoting. 3. It provides that

Neither domiciled foreigners nor those in transit have the right to have recourse to diplomatic intervention except when legal means having been exhausted before the competent authorities it is clear that there has been a denial of justice or a notorious injustice has been done, or that there has been an evident violation of the principles of international law.

This law, apparently very rigid, is clearly qualified by the last phrase, which evidently destroys the efficacy of the whole article, from the point of view of limiting the rights of reclamation. This fact seems, however, to have been overlooked by the diplomatic corps at Caracas, for a meeting was held to discuss the question of issuing a joint note of remonstrance. 4. No decision was reached and apparently the matter was dropped. It was really a protest against the spirit rather than the letter of the law.

1. 87 *ibid.*, 703 2. 96 *ibid.*, 647 3. Art. 11, *ibid.*, 648 4. *For. Rel.* 1903, p. 806



that denial of justice was a well recognized ground for diplomatic intervention but that the determination of such questions was to be left to rules of international law and furthermore that decisions of national tribunals could constitute no bar to international discussion. The Salvadorean government, however, did not maintain the position which they had aimed at, but declared that the law in question referred 'only to claims which have their origin in acts of the judicial authorities and not to claims that are founded upon an anterior act of the gubernative authorities.' 1. This opinion substantially neutralized the force of the law although it became the subject of representations to the Salvadorean government by members of the diplomatic corps.

A similar controversy arose over the Costa Rican law respecting foreigners, which had been promulgated the same year. The Costa Rican statute provided practically the same limitations on the right of aliens to make claims or to resort to diplomatic intervention as the Salvador law. 3. The United States government again protested and pointed out that a 'municipal law excluding foreigners from having recourse to their own sovereign to obtain for them redress for injuries inflicted by the sovereign making the law has, in itself, no international effect'. 4. Furthermore the United States would have the right to insist upon such claims whenever they felt that redress should be given.

The Mexican law respecting foreigners 5. had identical provision to those of the other countries whose laws we have just been considering. No protest, however, was made against these

1. 1887 ibid. 114 2. VI Moore, 268 3. 77 Br. & For. State Papers, 727 4. 1887 ibid., 99 5. 77 ibid., 1270 et seq.

(57122)





provisions.

Slightly different in content was the law of Ecuador regulating the matter of alien claims. 1. The government was only to be held responsible for the voluntary and premeditated acts of officials and that aliens could claim only when nationals possessed a similar right. 'Nevertheless the government may, for the sake of equity, indemnify neutral and peaceable foreigners regard being had to the condition of reciprocity of the country to which they belong in analagous circumstances.' 2.

This apparently liberal law was stringently amended in the year 1888 following a civil war, and the rights of aliens to claim were greatly restricted. The government refused to be responsible either for acts of the insurgents for the military operations or acts of repression and measures of security resorted to by the government. 3. The provisions of this decree, so palpably unjust, aroused a considerable feeling of disapproval in the diplomatic circles. The diplomatic corps at Quito sent a collective note on August 29, 1888 to the Minister of Foreign Affairs of Ecuador informing him that should cases arise, pending the receipt of instructions from their governments, that they would act on the principle that the internal law of a state could not alter the principles of international law to the prejudice of aliens. 4. This note was communicated by the President to the Chambers who, however, refused to modify or amend it in any way. The President then resigned, but his resignation was not accepted. 5.

The Ecuador Law was changed again four years later. (6) This (5122)  
1. 77 ibid., 728 2. Ibid., p. 731 3. 79 ibid., 166 4. 79 ibid., 166, note 5. 1888 For. Rel. 491. Nothing further on this matter is to be found here. (6) 84 Br. & For State Papers, 644



In Salvador in the year 1908 an entirely different sort of statute appeared but what its influence upon the question of responsibility will be, it is indeed difficult to say. The provisions of this statute relating to the matter of responsibility are so unique in character that it may be worth our while to quote them. 1. The provisions are as follows:

Article 3. It is prohibited to stipulate in treaties or international agreements the national treatment accorded in matters where our laws do not put the natives on an equal footing with foreigners.

Article 6. The negotiations of our international treaties with endeavor to introduce in the arguments referred to in Article 4, 2. a special clause which will determine the cases in which the official action of diplomatic agents in civil, criminal, or administrative cases of their fellow citizens is admissible under international law; by denial of justice; for lack of the execution of a final judgment or by express violation of the treaties in force, or the rules of the public or private international law generally recognized by civilized nations, whenever either in one or the other case all the means that the respective legislatures grant to the plaintiff have been exhausted.

Article 7. There will also be endeavored to introduce in said treaties the principles of the irresponsibility of the Government for damages, likel, or exactions caused by persons or property of foreigners in times of insurrection or civil war within the national territory by rebels or revolutionists.

We shall presently point out the arguments against the practice of inserting clauses of non-responsibility into treaties. It seems strange that in the face of general international disapproval, that Salvador should have passed a law of this sort. It is possible, however, that this type of law represents a last stand of the idea of non-responsibility, but even this would excuse its existence.

1. Ibid., 1908, 706

2. Most favored nation article.





These laws must suffice for our study of the attempts at statutory regulation of the problems of responsibility. It is a noteworthy fact that stringent as many of these statutes and decrees may seem, they do not attain the radical developments which we found to have been the case with the constitutional restrictions upon the rights of aliens. The attitude of the European states has been one of grave disapproval of such acts, and upon more than one occasion they have resorted to remonstrance. The Latin American governments, as we have seen, have usually been amenable to such remonstrances, but they stand as a man by the right which they declare they possess, namely, to regulate the matter of responsibility. This is brought out well in the proceedings of the Pan-American conferences.

At the first Pan-American Congress held in the year 1890, the committee on claims and diplomatic recommended the following to be adopted as principles of 'American' international law.

1. Foreigners entitled to enjoy all the civil rights enjoyed by natives, and they shall be accorded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.

2. A nation has not, nor recognizes in favor of foreigners any other obligations or responsibilities than those which in favor of the natives are established, in like cases, by the constitution and the laws.

These projected principles of international law, supported by an eloquent appeal in their favor were accepted by all of the delegates there assembled with the exception of the United States.<sup>2</sup>

1. International American Conference, - 1st conference 1890 - Reports of Committees, v. II, p. 233      2. Haiti abstained from voting.





Mr. Trescot 1. the delegate of the United States in an able minority report pointed out that these rules would mean an absolute exclusion of diplomatic reclamation. That cases of reclamation were of such nature that they could not be submitted to the prejudices of municipal law and that these were far better removed to the jurisdiction of an impartial international tribunal.

In the second Pan-American conference which was held at Mexico City, the question again came up and was discussed in even greater detail. There were several proposals submitted, and after considerable discussion, the following convention was adopted to which the majority of powers represented became signatories. The United States has as yet not signed the convention. 2.

First: Aliens shall enjoy all civil rights pertaining to citizens, and make use thereof in the substance, form or procedure, and in the recourses which result therefrom, under exactly the same terms as the said citizens, except as may be otherwise provided by the constitution of each country.

Second: The States do not owe to, nor recognize in favor of foreigners, any obligations or responsibilities other than those established by their constitutions and laws in favor of their citizens.

Therefore, the states are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war, whether civil or national; except in case of failure on the part of the constituted authorities to comply with their duties.

Third: Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a state, or its citizens, he shall present his claims to a competent court of the country, and such claims shall not be made, through diplomatic channels, except in the cases where there shall have been, on the part of the court, a manifest denial of justice, or unusual delay, or evident violations of the principles of international law.

1. International American Conference, loc. cit., v. II, 937
2. Actas y documentos de la Segunda Conferencia Pan-Americana, 830



These rules, sweeping as they may seem in their applicatory force, must not be interpreted as limiting absolutely the right of diplomatic reclamation. The opportunities for a state claiming the responsibility of another state are equally great here, as in the special statutes which we have considered. It will be noticed that diplomatic recourse may be sought when there has been a manifest violation of the principles of international law, a phrase which, in itself, permits a very wide latitude of interpretation. It would be possible moreover to interpret this rule after the manner of Señor Delgado, when the United States protested a similar expression of this principle in the Salvadorean law of 1887. 1. Evidently the conventions of the Pan-American conference if generally adopted will exercise but little restraint upon the right and use of the power of reclamation.

The problem of pecuniary claims was further settled by the Convention of the same congress, which provided that the signatory powers would submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens, and which cannot be amicable adjusted through diplomatic channels, and when said claims are of sufficient importance to warrant the expenses of arbitration. 2.

As was pointed out in the Third Congress held at Rio de Janeiro this stipulation did not mean that all cases were to be submitted to arbitration, but only those which for special reason, as the previous convention provides, and those to which international law devotes particular attention which would give them international character, were intended. The United States ratified this con-





vention.

The conventions of the conferences furnish an excellent criterion of the Latin American point of view, and are significant in that they show the remarkable unanimity among these states on the subject of responsibility. Their efforts are however directed against the method of presentation of claims rather more than against the problem of responsibility. The latter question comes up much more sharply in the treaties which the Latin American states have concluded in their attempt to free themselves from responsibility.

The existence of these treaties may be traced back as far as the year 1863 when Bolivar and Peru concluded a treaty of peace on the 5th. of November which stipulated among other things, 2. that

the citizens of the contracting parties cannot claim indemnities from the other for casual accidents happening without the fault of the constituted authorities, nor for losses they may suffer by intermeddling in the political affairs of the country in which they reside, nor for imprisonment, subjection to trial, or other consequences that may come upon them, if they lend themselves to the service of revolutionary chiefs, either personally or with their property. In cases of illegal imprisonment they must address themselves to the tribunals to obtain from them the proper reparations and indemnities against those who may have occasioned and decreed it.

Neither for the foregoing causes nor for any other shall diplomatic reclamations be made or admitted by one of the contracting parties against the other, during the legal course of the trials, and when the ordinary and extraordinary recourses that the laws admit, are exhausted, they shall only then take place in the cases in which, according to the laws and the principles of equity, there shall have been notorious injustice. 3.

The provisions of this treaty, although they antedate the efforts to limit the matter of responsibility through constitution-

1. Third International American Conference. Minutes etc., p. 181  
2. 55 Br. For. State Papers, 837 3. Ibid. 839-40, Art. 10 & 11



al or statutory restriction, are, however, not the earliest attempt at regulation. In 1852 the Venezuelan government in connection with a proposition to codify the American public law had included a provision by which claims of foreign governments for private individuals would not be received. To pave the way for an entente on this subject, M. Leocadio Guzman was sent to various South American capitals. Apparently the proposal did not materialize. 1.

The Peru-Bolivian treaty represents the most rudimentary form of all the treaties in the matter claiming indemnities. On this matter it is vague and unsatisfactory and would permit a wide latitude of interpretation. The provision relating to diplomatic reclamation in general, is more definite, but it, too, is in no sense very inclusive.

The date of the next important treaty in which the question of responsibility came up was Feb. 10th., 1870, between Colombia and Peru. This treaty provided that there should be simply equal protection of the aliens with nationals, and that injuries inflicted by rebels or by private individuals or by 'unavoidable causes' could not give rise to indemnities. Diplomatic intervention was to be permitted only when either state had neglected giving equal protection, or where injustice had been flagrant.

This treaty was in substance more definite than the preceding one, although it will be noted the question of diplomatic intervention was still more or less vague. This was also the case in the treaty between Peru and the United States of the same year.3.

1. 4 R.D.I. p. 227 note 2. 60 Br.For.Rel., 349, 228  
3. Martens N.R.G. 2 ser. I, 97





This treaty took up only the question of diplomatic intervention, and is especially noteworthy for the fact that it was the first treaty between a Latin American state and a foreign country in which the question of responsibility was regulated. Moreover it is the only treaty of this sort which the United States has ever entered into. 1. The treaty remained in force for ten years. 2.

It were a tiresome and useless task for us to discuss the provisions of the many treaties in full. As a rule the treaties are almost uniform in their provisions which seek to limit the responsibility of a state, from the year 1870 on. Besides limiting the problem of diplomatic intervention, many of the treaties expressly repudiate all responsibility for the injuries to aliens except as they have been sustained by reason of acts of functionaries. These, then, are the two chief characteristics of such treaty provisions. Some of the treaties, however, contain stipulations which do nothing more than declare that aliens are to have equal rights with nationals and nothing more, and rest on the doctrine of implied powers. Thus we have the treaty between France and Colombia, May 3d., 1892, article 1, which has a provision of this sort for the protection of their interests. Since 1890 most of the treaties which these states have concluded have contained clauses which provided for arbitration. This has been done in pursuance of the resolution of the first Pan-American Conference held at Washington.

1. Alvarez in his "Droit International Americaine", p. 124 remarks that the United States had entered into no treaties of this sort. The above citation proves this statement to be incorrect.

2. Art. 38, sec. 1. 3. Martens, Nouveau Recueil Général, sec. 2, XVIII, p. 611





A single quotation of the sort of provision which is to be found in the more recent of these treaties will suffice as an illustration of their extent and probable efficacy. On the whole these treaties are similar, there being but slight differences in verbiage or content. The following quotation is from the treaty between Mexico and Germany, of the 5th. of July, 1882. 1. Paragraph 2, Article 18 says as follows:

The contracting parties, desirous of avoiding any occasion which might injure their friendly relation, mutually agreed that their diplomatic representatives shall not intervene on matters of claims or complaints of individuals in cases which belong to the realm of civil or criminal justice or to the decision of administrative offices, unless it be that such cases deal with denial of justice, extraordinary or illegal failure of justice or the non-execution of a valid judgment, or, lastly, after all the legal remedies have been exhausted there appears to be a clear violation of the existing treaties stipulations between the contracting parties or of the rules of international law or of international private law generally recognized by civilized nations.

Furthermore the contracting parties agreed that the German government will not hold the Mexican government responsible for injuries, acts of oppression or extortion which the subjects of the German empire might suffer at the hands of the insurgents in times of civil war or insurrection or which are caused by the wild tribes which do not recognize the authority of the government, unless the fault be due to lack of diligence on the part of the Mexican government or its agents. 2.

Many of the countries deviated from the stipulations of this treaty and provided for mutual non-responsibility. This is especially true when the treaties are between two Latin American states although the same thing is to be found in some of the treaties with European governments.

1. Ibid., sec. 2 v. IX, p. 774 2. Ibid., vol. cit. p. 484



In addition to the treaties which we have already cited there have been many others within the last fifty years which are similarly constructed. The following list will give some idea, at least, of the extent and importance of the movement.

Argentina and Peru, 1. March 9, 1874; Salvador and Honduras, March 31, 1878 - art. 13 & 14 - 2.; Salvador and Costa Rica, November 8, 1882, art. 15 & 16 3.; Venezuela and Salvador, August 27, 1883, art. 5 4.; Salvador and Nicaragua, November 17, 1883, art. 13 & 14 5.; Norway-Sweden and Mexico, July 29, 1885, art. 21 6.; Salvador, Guatemala and Honduras, September 12, 1885, art. 29 7.; France and Venezuela, November 26, 1885, art. 5 8.; France and Mexico, November 27, 1886, art. 11 9.; Belgium and Ecuador, March 5, 1887, art. 3 10.; France and Ecuador, May 12, 1888 11.; Mexico and Ecuador, July 10, 1888, art. 3 12.; Mexico and Dominican Republic, March 29, 1889, art. 11 13.; Italy and Mexico, April 16, 1889, art. 12 14.; a similar treaty between the same countries, April 16, 1890, art. 12 15.; Italy and Colombia, October 29, 1892, art. 21 16.; Germany and Colombia, July 23, 1892, art. 20 17.; Italy and Paraguay, August 22, 1893, art. 3 18.; Mexico and Salvador, April 24, 1893, art. 3 19.; Spain and Honduras, April 28, 1894, art. 4 20.; Bolivia and Chili, May 18, 1895, art. 5 21.; Belgium and Mexico, June 7, 1895, art. 15 22.; Spain and

1. Martens, N.R.G., sec. 2, XII, p. 443 2. ibid. v. XIV, p. 195  
3. Actas etc., p. 251 4. ibid. p. 215 5. ibid. p. 228 6. ibid. v. XIII, p. 690 7. ibid. XIV, p. 268 8. ibid. XII, p. 685  
p. 280 9. Du Clercq, *Traité*, v. XVII, p. 280 10. Martens, N.R.G. sec. 2, v. XV, p. 740 11. This treaty was never ratified by France. cf. Du Clercq, v. XVIII, p. 46 12. Martens, N.R.G. sec 2, v. XVIII, p. 750 13. ibid, p. 761 14. ibid., v. 711 15. ibid., p. 771 16. ibid., XXII, p. 308 17. ibid., XIX, 831 18. ibid., 19. ibid., XX, p. 864 20. 2 R.D.I.P., p. 337 21. Martens N.R.G., sec. 2, v. XXXIV, p. 396 22. ibid. XXIII, p. 73





Peru, July 16, 1897, art. 4 & 6 1.; Holland and Mexico, September 22, 1897, art. 18. 2.

Of the total number of treaties which we have examined fifteen were concluded by the Latin American states with foreign states and twelve among each other. Mexico has been the most fortunate of all. She has concluded no less than nine treaties by which she divested herself of responsibility. Salvador ranks second with six treaties to her credit. Among the European states, France and Italy have each concluded three treaties of this type.

We have already seen that the Institute of International Law at its meeting in 1900, expressly condemned this sort of treaty-making, and in the rules which it drew up in regard to the question of responsibility for injuries sustained by aliens it recommended, 3. as will be remembered,

that the states refrain from inserting clauses of reciprocal non-responsibility into their treaties. It believes that such provisions are wrong in exempting states from the performance of their duty to protect their nationals abroad and their duty to protect aliens within their own territory. It believes that states, which, by reason of extraordinary circumstances, do not feel that they are in a position to assure in a sufficiently high degree the efficacious protection of aliens within their territory, may escape the consequences of such a state of affairs only by temporarily interdicting aliens access to their territory.

No better criticism can be given the movement in Latin America than this resolution of the Institute. It clearly shows the lack of international precedent upon which such treaties might be based.

1. *ibid.*, XXXII, p. 69 2. Martens N.R.G., ser. 2, XXXIII, p. 188  
3. Annuaire de l' Institute droit Int., vol. 18, p. 253-4



But we do not condemn the latter solely for this reason, but because they are aimed at the overthrow of an important international principle. It is true that they affect only the contracting parties, but the moral influence which such treaties may exert is certainly considerable. For example, two states might agree between each other, not to prosecute acts of piracy which subjects of one state might inflict on the other. Would the fact that such an agreement was limited to the signatories destroy the demoralizing effect which such a treaty might have upon international jurisprudence? Certainly not; and so it is with the theory of responsibility. It may be said in favor of these treaties, however, that they are not nearly as comprehensive as might be supposed, in regard to the provisions relating to diplomatic intervention. Similarly to the statutory regulations they are not immutable but may be regarded as having been framed with a view to preventing indiscriminate reclamations. To make an attempt of this sort through an international document is as we have pointed out, a dangerous tendency and might pave the way to a discreditable practice among states.

Before we proceed to examine the cases which have arisen as the result of the numerous Latin American revolutions, let us briefly summarize the tendencies which have been discussed up to this point. The efforts of the Latin American states to regulate the matter of responsibility, which have found expression in the constitutions, statutes and treaties of these countries may be ascribed to the leading policy which at one time found favor in Europe, namely the attempt to regulate matters of responsibility by municipal legislation rather than by international law. We have al-





ready seen the objections to such a policy on the part of the European states. In the case of the Latin American states the problem becomes a much graver one not only because of the means which they have employed and the extremeties to which they have gone, but also because of the fact that the peculiar internal situation makes such regulation not only difficult and undesirable but, in fact, really dangerous. It is true that international standards for the treatment of aliens find their basis in the treatment of nationals at home. Thus, we find that with the general political uplift of the masses during the nineteenth century there was a concomitant betterment of the condition of aliens. Now it is asserted that in theory aliens are entitled to no better treatment and no greater rights than the nationals of a country and as a matter of internal law most jurist are agreed that this is so. But theory also argues that a state may treat its subjects as it deems proper; it may deprive them of civil rights, refuse justice and, indeed, maltreat them to what extent it pleases. The question of the validity of such contentions and how the opposing views are to be reconciled is the crux of the Latin American problem. As has been indicated, they are questions of municipal law, not of international law; but in spite of this fact they exert influence on the development of such jurisprudence.

Leaving aside for a moment the legal aspects of the question and arguing from the point of view of abstract morality it might be admitted, that the state has such extensive control over its subjects, and this would undoubtedly be the case if we could conceive of a state existing apart from all other nations alike unaffected and unaffected by contact with them. The practical necessities of international relations, however, clearly demonstrate the impossi-





bility of such a view. If we admit that, in the last analysis, a state is the controlling power, the pilot of its own existence, then these international considerations are of little value. But if we take as the determining factor of state life, the mutual interests and well-being of the whole international community, we come to the conclusion that it is beyond the sphere of a single state to determine and command its own destinies, regardless of the effect its actions may have upon the destinies of the many. If this be the case, then a state which maltreats and denies justice to its subjects, or countenances such actions, is bound to extend greater privileges to aliens. It is upon a similar basis that the theory of extraterritoriality rests. The Latin American states cannot be the final arbiters into whose hands the regulation of the status of aliens within their jurisdiction, is to be placed. The whole course of their political history as independent nations has proven their incapacity for such a role. It is only by entrusting to international jurisprudence the determination of the rights and privileges of aliens that we shall be able to attain justice in conformity with the standards of the twentieth century.

We turn next to the international practice of the Latin American states as it is illustrated in the many cases which have arisen. To consider fully all of these cases were a tedious task. Their number is legion, and with exception of a few of the leading cases express no new principles. In the following discussion, we shall take up only those cases which clearly have had a constructive value, keeping in mind the general sentiment in the Latin American states and the internal regulation of responsibility. We shall see moreover, to what extent the practice of these states is comparable to that of the great European nations, and whether they have been



affected by the practice in these states.

It is not our purpose to enter into a discussion of the cases which arose in the Latin American states prior to the year 1850, with the exception of the claims which gave rise to the celebrated 'Pastry War' between France and Mexico. In the majority of the Latin American states, the history of their existence from the war of independence up to the middle of the century was one of almost continuous revolution and strife. It was distinctly a formative period, in which the newly independent states were vainly trying to find themselves. This early period is of little interest to us. Reclamations were as numerous as civil wars, but practically none of the cases reached the dignity of a real international conflict. It is true that the Latin American states frequently denied their responsibility but they invariably came to terms. It is only after the year 1850 that the Latin American states began to make a more concerted and purposeful attempt to deny their responsibility. This as we have already seen took the form especially of internal regulation. The height of the movement was reached in the early nineties, when three important revolutions took place in rapid succession. A powerful effort was made against the right of foreigners to claim, but to no avail and it seemed to have been conclusively settled that the Latin American states would henceforth be obliged to admit their responsibility. The intervention in Venezuela in 1902 confirmed this view. But we are anticipating. Let us briefly examine the 'Pastry War' case which arose in 1838.

Like other Latin American countries Mexico since her independence had been the scene of continuous insurrections and outbreaks in which foreigners as well as nationals had suffered considerably





The French subjects in Mexico, especially, had sustained great losses. 1. The basis of the relations between France and Mexico was a provisional treaty which had provided for mutual guaranties of freedom, safety etc. This treaty had never been fully concluded due to the inaction and opinion of Mexico. 2. No attention being paid to her claims, France finally lost patience and sent her ultimatum, demanding the payment of 600, 000 as indemnity within three weeks. 3. The terms were refused, and accordingly, France severed diplomatic relations and declared the Mexican ports to be under blockade. This procedure, although in itself successful, did not bring the Mexicans to terms. Admiral Baudin was sent with reinforcements to initiate a more vigorous policy.

Immediately upon his arrival, Baudin demanded an answer to the late ultimatum. 4. The Mexican government desired a settlement and agreed to hold a conference to accede to French demands and the conference came to naught. Admiral Baudin then resorted to more vigorous methods. The Fort of San Juan de Ulna commanding the harbor of Vera Cruz surrendered after a heavy bombardment by the French fleet. A preliminary agreement was made with the commander which the Government however repudiated. The 'war' continued but after the shelling of Vera Cruz and its <sup>and</sup> ~~abandonment~~ the British government offered to mediate and the two contending countries agreeing, a conference was held. France did not, however, follow up her advantage, but accepted practically the same conditions which the Mexican government had offered her at the conference at Jalapa. 5.

1. The name 'pastry war' was applied to this controversy by the Mexicans in ridicule of the claims of a French baker who had suffered losses. 2. 27 For. St. Pap., 1178 3. Bancroft, Works, v. 13, p. 187 for resumé. 4. 27 Br. & For St. Pap., 1176 5. Ibid, 1186 ff



During the course of the dispute an interesting doctrine was aired by the Mexicans. They declared 1. that

We are a nation always agitated by revolutions; as such we suffer all the consequences of a state of revolution, popular tumults, robberies, plunderings, assassinations, unjust decrees; and since we are obliged to suffer all these evils, we consider that the foreigners who may be in our country must suffer like ourselves, without a chance of redress or compensation.

For an almost anarchistic exposé of the feelings of the Latin Americans on the subject of responsibility, this expression is without doubt the most interesting. Although it may appear to be an exaggerated position nevertheless as we proceed to examine further cases, it stands as the most concise and candid statement of principle, invariably reiterated by the Latin American states.

In the year 1856 an important case known as the Panama Riot case arose between the United States and the republic of New Grenada. 2. This outbreak was the result of the refusal of a drunken passenger at the railroad station of Panama to pay ten cents to a Negro watermelon vender. The companion of the Negro fired a shot among the passengers, and a mob quickly collecting an attack was made upon the innocent travellers in which the police of Panama joined. After considerable slaughter and plundering the governor of the city managed to disperse the mob.

The government of New Grenada in a convention signed September 10, 1857 by the two disputing powers, acknowledged 'its liability, arising out of its privilege and obligation to preserve peace and good order along the transit route.' 3.

1. 27 Br. & For. St. Pap., 1176 2. For facts cf. Moore, History and Digest of International Law, v. II, 1362 3. La Fontaine, Pasicrisie International, p. 34 4. Malloy, Treaties, I, 302 ff., art. 35





The matter was referred to arbitration and a commission was appointed to make investigation and awards. The commission met at Washington June 10, 1861 and sat for the nine months stipulated in the convention. The total awards were 436, 235.45 **1.** but having been obliged to adjourn before all the cases had been argued, a new convention was entered into, Feb. 10, 1864 **2.** and by the commission herein provided for, the sum of 88, 267.88 was further awarded, an amount which included certain other important claims. **3.** The British Government also had certain important claims which were settled through the ordinary diplomatic channels. The amount of these claims was <sup>6</sup>4,745. **4.**

It might seem from the convention between the United States and New Granada that the decision in this case was based solely on the treaty stipulations, but this is not quite so. General Herran the envoy of New Grenada pointed out that this was an extraordinary liability of his government based on principles of international law and the treaty stipulation between the country and that the provisions of the convention were not to be understood as giving rise to any further obligations beyond those the settlement of which it was framed for. **5.**

The 'pastry war' case has already initiated us into the intricacies of Mexican politics. Unfortunately for that turbulent republic the French intervention in 1838 had not taught them a lesson, and within twenty years they faced a very similar situation. **6.** when the celebrated triple intervention of 1861-2 took place.

**1.** Moore, Int. Arb., II, 1394    **2.** Malloy, Treaties I, 321    **3.** ibid. 322 also Moore op. cit. 1415 et sq.    **4.** 65 Br. & For. St. Pap. 1219  
**5.** Moore, op. cit., II, 1369





It is not our intention to enter into a detailed discussion of this case, important though it is; the facts and the outcome of the dispute are too well known. The British claims against Mexico were based not only upon demands for indemnity to certain of her citizens for losses and injuries sustained during numerous disorders, but also claims for bonded debt, this latter item forming the principle ground for her intervention. Repayment of the sum of 600,000 stolen from the legation house was also demanded.<sup>1</sup> The Spanish claims were based mainly upon a recognition of claims by a previous convention. The French intervention was solely for certain bonded indebtedness of Mexico. <sup>2</sup> These claims the party then in power in Mexico refused to recognize on the grounds that they did not consider themselves responsible to foreign nations for the acts of their predecessors. <sup>3</sup> After a long period of diplomatic haggling the three governments decided that the only means left open to them was the severance of diplomatic relations, and a joint intervention was decided upon. To this end a convention was signed in London October 31, 1861 by the three governments in question. <sup>5</sup>

The United States government was invited to give her adherence to the convention. Mr. Seward declined, <sup>6</sup> however, but indicated that as long as the powers restricted their activities within the

<sup>1</sup>. For an idea of the Br. cf. 52 Br. & For. 272 & 287 <sup>2</sup>. 52 ibid., 392 <sup>3</sup>. 52 ibid. 393 <sup>4</sup>. 51 ibid. 63 <sup>5</sup>. This convention provided among other things that 'the high contracting parties engage not to seek for themselves, in the employment of the coercive measures contemplated by the present convention any acquisition of territory nor any special advantage, and not to exercise in the internal affairs of Mexico any influence of a nature to prejudice the right of the Mexican nation to choose and constitute fully the form of its government.' . art. II, ibid. <sup>6</sup>. House Doc. 100, p. 187



limits provided by the second article of the convention, that the United States would not interfere.

In the latter part of the year 1861 the squadrons of the three powers sailed to Vera Cruz and seized that port. Shortly after this the course of the French becoming apparent, the English and Spanish occupying force withdrew 1. Their action was approved by their respective governments. A treaty was made between Great Britain and Mexico but was not ratified. 2. This was followed by a convention in 1866 which finally settled the question. 3.

Such in brief are the outlines of the intervention in Mexico, which takes us no further than the beginning of the French dominance. The affair requires but little comment on our part. From the point of view from which we are studying the question, the joint intervention was justifiable. A careful reading of the state papers of the period reveals to us the shocking state of affairs in Mexico, which even so able an historian as Mr. Hubert H. Bancroft is not justified or able to defend. Strangely enough the vigorous action of the powers did not seem to have the desired effect upon the Latin American states, for presently further claims arose in others of these turbulent states. It is difficult for us to say to what extent this phlegmatic attitude of the Latin American countries was based on the illusory protection which the Monroe doctrine seemed to afford them. Many writers are inclined to the view that the apparent indifference of these states is to a large extent due to the sentimental protection of the Monroe doctrine, 4.

1. Bancroft XIV, 43 2. 53 Br. & For. Pap. 3. 56 *ibid*, p. 7  
4. Thus G.W. Scott in Annals of the American Academy, v. 22, p. 80





and to a certain extent this view may be justifiable. On the other hand the attitude of the United States in the majority of the great conflicts between Europe and the Latin American states has been one of not attempting to protect these countries from being coerced into paying their debts. Thus in 1838, 1861 and again in 1902 the United States held aloof. It is really inconceivable that these Central and South American republics could hope for protection in cases of this sort. Their attitude may be explained far more satisfactorily by those very deficiencies and peculiarities of their national character which have made possible the instability of their political life.

A number of claims of United States citizens against Peru, and a claim of Peru against the United States were settled by two commissions appointed by these countries, to arbitrate these matters.

1. The most interesting of these claims of responsibility was that of Peru relative to the ship Alleghanian. The Alleghanian was an American ship loaded with guano belonging to the Peruvian government. On the night of October 28, 1862 the ship was boarded by a party of confederates, set fire to and burned while at anchor in Chesapeake Bay. The Peruvian government requested the United States to refund the value of the cargo lost. In a note of January 9, 1863 Mr. Seward rejected the claim on the ground that it was an act of treason and piracy which the United States government had not been cognizant of before its commission, although it had exerted extraordinary vigilance in the vicinity. The incident had occurred without fault of the government by insurrectionary citizens over whom the former had momentarily lost control. 2. When the

1. Moore, Int. Arb., II, 1615 et sq. 2. ibid., 1622 et sq.



case was brought before the claims commission it was rejected on the grounds that it was a government claim and not that of a private citizen. Subsequently the guano was recovered in a damaged condition and sold for 25,962.40 of which sum the Peruvian government received 1.2. 1.

Claims of the United States settled by these two commissions included certain demands for indemnity for injuries sustained by American citizens in various Peruvian insurrections. These claims were settled favorably to the United States. 2. Another claim against Peru was settled in 1871. The Peruvian government by a decree of Feb. 27, 1871 ordered payment for the damages caused by the sacking of Callao in 1865 by the insurrectos under Col. Prado. Two citizens of the United States were indemnified by this decree. 3.

In this same year the United States again had occasion to demand the responsibility of a South American state in the case of the steamer Montijo. 4. On April 6, 1871 a party of revolutionists in the state of Panama, Colombia seized the vessel Montijo belonging to an American company. In a note dated June 21, 1871 Mr. Fish, the secretary of state directed Mr Hurlbut the United States minister to Colombia to apply for reparation on the basis that the seizure of the Montijo was a piratical act for which compensation must be made on the basis of the treaty of 1846. 5. The Colombian government denied its responsibility for losses to aliens through 'common crimes'. It prosecuted the offenders but nothing came of

1. ibid. 1624 2. Moore, op. cit. II, 1629 & 1652-7 3. Moore, Digest, VI, 973 4. Moore, Int. Arb., II, 1421 et sq.; For. Rel., 1871, p. 230 5. 1871 For. Rel. 230. For the treaty cf. Mallery, Treaties, I, p. art. 8





the proceedings.

Finally, the two governments resorted to arbitration in the year 1874 <sup>1</sup>. and the case was decided in favor of the owners of the Montijo, the sum of 33,401 being allowed them <sup>2</sup>.

Two points of especial interest to us were raised in the course of the dispute. In the first place, the Colombian government asserted that it could not be held responsible for debts of the state of Panama because in this case they were private in character. The umpire, however, pointed out that these debts were those of the federal government not only because violation of treaty privileges was involved but also on the ground that debts so incurred were clearly public in character. Furthermore, he asserted, that in a federal system such as that of Colombia in foreign relations the constituent states were non-existent

<sup>3</sup>. Second point was urged by the umpire in connection with the placing of liability. The officers of the Union had failed in their treaty and international law obligations to protect United States citizens. That it was clearly the duty of the President of Panama as agent of the federal government to recover the Montijo 'It is true that had not the means of doing so ... but this absence of power does not remove the obligation. The first duty of every is to make itself respected both at home and abroad. If it promises protection to whom it consents to admit into its territory it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make true amends in its power viz. compensate the sufferer' How completely antagonistic is this

<sup>1</sup>. Pasicrisie 209 & on convention. <sup>2</sup> Moore II, 1443 <sup>3</sup>. *ibid.* 1439





view to Mr Seward's in the case of the Alleghaniam an unexampled illustration of the inconsistency of governments, for not only has the United States acted contrary to this latter view, but later as we shall see she attempted to escape responsibility on the basis of the nonresponsibility of a federal government for the acts of separate states. 1.

A case very similar to that of the Montijo arose about the same time and is known as the case of the Venezuela Transportation Company involving certain claims of United States citizens against the Venezuelan government. 2.

The Venezuela Transportation Company incorporated under the laws of the state of New York and was operating on the Orinoco River and the coast of Venezuela. During the course of General Blancos revolution steamers belonging to the company were seized by one of the parties, 3. and the owners consequently suffered serious losses. The diplomatic correspondence was carried on for some 20 years when finally the President of the United States being empowered by joint resolutions of Congress in June 1890 to take measures as seemed necessary 4. a convention was entered into and the matter was decided by arbitration and the claimants were awarded the sum of \$141,500 5.

1. Case of Italian lynching in 1891 2. Moor Int. Arb. II, 1693 ff.  
3. There was no real de jure government at the time. 4. Moore op. cit. 1707 For a long time it seemed as if the two countries were going to war over the questions involved. 5. ibid. 1724  
2. con. One of the early Venezuelan claims cases involved important demands of the U.S. against the former country including damages suffered by the passengers on the vessel Apure in 1865. The commission of arbitration was accused of fraud and twenty years passed before another convention was drawn up and the matter settled. cf. 1866 For El. III; 431 ff. Mallory, Treaties II 156 Moore Int Arb. II 1660

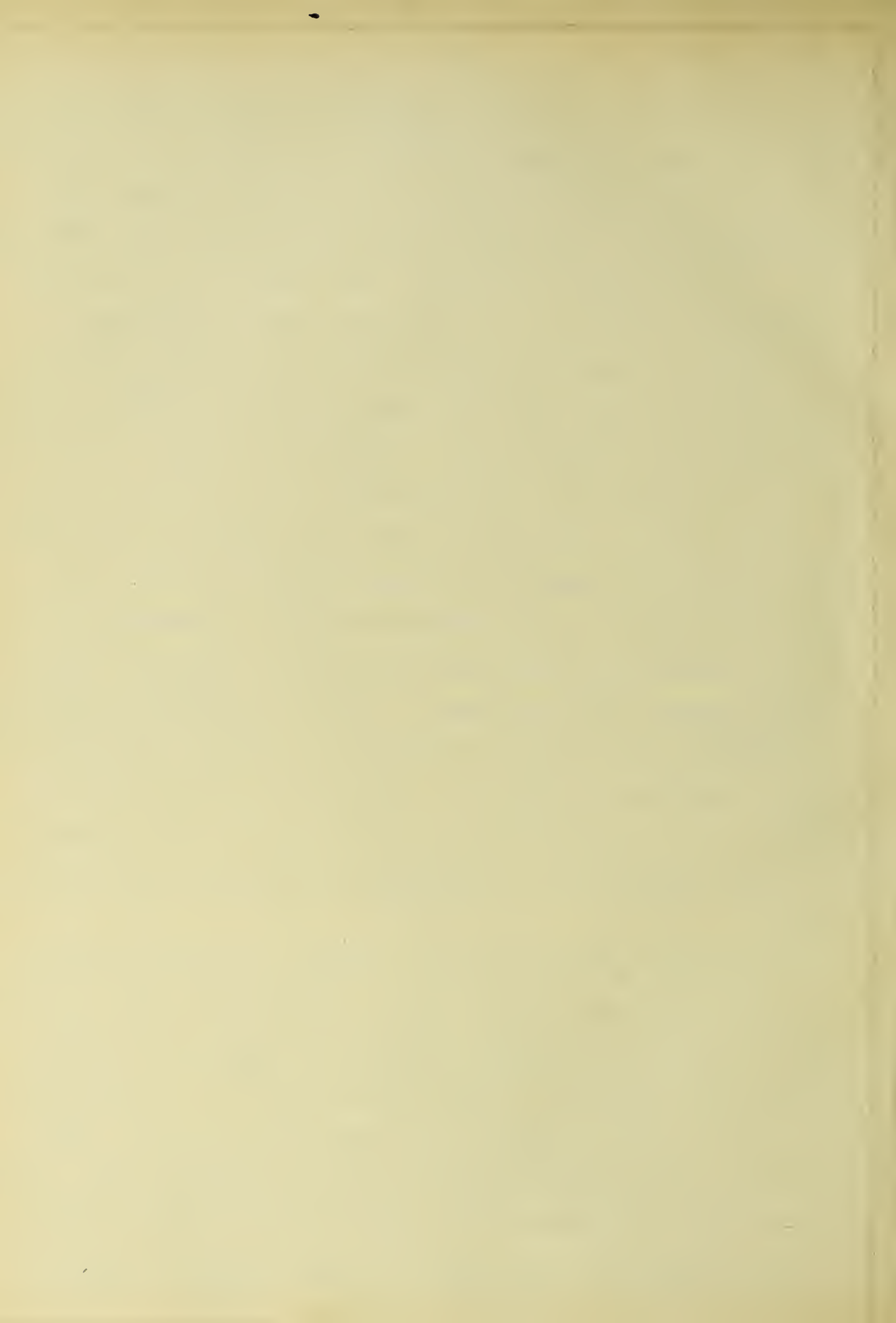


The Venezuelan government strenuously combatted the claims of the United States alleging that they were contrary to the principles of responsibility which the United States herself avowed. As to the explanations of the United States we shall see in the next chapter. A strong dissenting opinion **1.** was filed by the Venezuelan commissioner relative to the points upon which he disagreed. **2.**

A period of ten years ensued before any important claims of responsibility arose. The next cases involved the rights of aliens in Colombia and included the well known Arrut's affair. The claim of the United States in this case arose from the burning of Colon **3.** These losses by the decree of Aug. 19, 1885 which have already been examined the Colombian government proposed to settle by a mixed commission. **4.** This decree was later supplemented by a further decree which practically empowered the Colombian authorities to settle these questions, **5.** and in a resolution passed at the same time authorized the executive to throw out all claims for damages committed by rebels. **6.** The representatives of all the nations united in protesting against this act on. A protracted attempt to arbitrate the matter has even after 25 years had no result.

Mr. Byard in the course of the dispute, informed the various claimants that 'as a general rule of international law, a government is responsible for the consequences of acts of rebellion against its authority'. This dictum is difficult to agree with the constant policy of the United States not only in the cases which we have already examined but also in this very case. However ill-advised this expression of opinion may have been it was not

**1.** Nurre Digest, VI, 981 Moore V **2.** Sen. Doc 264 57 long. 7  
**3.** ibid 50, 76 Br. & For 566 **4.** ibid 80 **5.** ibid 81 **6.** ibid 11





taken advantage of by the Colombian government.

We turn next to the series of important revolutions which began in the year 1891 in Chili and which gave rise to important views on the question of responsibility. The Chilean revolution was the result of an attempt by President Balmaceda to keep in office a cabinet whom the Chilean Congress refused to support. The Congressional leaders opposed to Balmaceda were able to win over the navy and the revolt spread rapidly. The victory of the Congressional party, the resignation and death of Balmaceda terminated the insurrection. Following the restoration of peace and order, aliens submitted their claims for injuries and the inevitable question of responsibility was again brought up.

On August 8, 1892 the United States concluded a convention with Chili which submitted to an arbitral tribunal all the claims which American citizens had against the Chilean government. The claims were decided favorable to the United States. England on the 26 of September 1893 and France on October 19, 1892 signed similar conventions with Chili. The claims of Norway Sweden were entrusted to the Anglo-Chilean tribunal.

1. For discussion cf. Moore II 2117; also R.D.I.P. 268 2. Moore, II, 1859; also Br. & For. 74/876 In this previous year Haiti made settlement for the losses sustained by foreigners during the insurrection and riots at Port au Prince. The United States claims were settled by arbitration for 5,700. Other foreign claims amounting to 588,418 were ordered paid by a decree of Oct. 7, 1884. 3. 76 Br. & For 302 4. 1891 For Rel 90 cf. also R.D.I.P. I III 476 5. Moore II, 1469 ff. 6. R.D. .P. 476; 87 Br. & For 937 7. 85 Br. & For 22 7. RDIP 22; also L. Pasquais 480



The French claims were settled for 5,000 pounds sterling. 1.

In November 1895 the Italian government also concluded a convention to arbitrate. Germany was accorded a lump sum indemnity without resorting to arbitration.

As the writer in the *Revue General de Droit International Public* points out the conclusion of these conventions would indicate that the Chilean government did not refuse to regard itself as responsible. In fact, in the correspondence of the United States, Mr. Egan the minister of the U.S. government was favorably disposed to acknowledge its own responsibility. 2.

A more serious dispute was the demand of certain European powers for reparation following the civil war in Venezuela of 1892 4. The representative of Germany was intrusted with the claims of England and Holland, and the Spanish legation exercised provisionally the claims of Italy. France and Belgium also presented demands for indemnity. The Venezuelan minister of Foreign Affairs insisted that claims of aliens should be made before the special claims commission which had been established by decree of Nov. 22, 1892 for the payment of all requisitions of the de jure government. All these claims were cognizable only by the high federal court. The diplomatic representatives did not feel that they could accord these with in as much as it meant that the Venezuelans would themselves investigate and settle all claims. The establishment of an international commission seemed to them the most advisable course.

The Venezuelan government opposed this plan very vigorously,





so vigorously indeed, that the diplomatic corps decided that some sort of pressure should be brought to bear, and to this end the Belgian charge drew up a memorandum which was signed by all the representatives of the interested powers. About this time the Italian minister arrived on the scene. He refused to sign the note on the ground that he was not sufficiently informed of the facts to warrant his doing so. 1.

The Italian government questioned the various foreign offices as to their intentions, and at first seemed decidedly in favor of concerted action. On the advice of <sup>Count</sup> ~~Arnut~~ Magliano however the claims of the Italian subject not being very considerable, Italy finally decided to act for herself 2. The other nations were all decidedly in favor of one or more international commissions as their claims were all very numerous, due however, to administrative delay and changes in the diplomatic corps the entente was never formed. Meanwhile the Italian indemnities were settled upon the basis of from 5 to 30 per cent of the amounts claimed payable in government bonds to be issued for the creation of a special indemnity fund for the civil war. The French claims were settled by a convention signed Feb. 19, 1902 4. which provided for arbitration thereof. This was superseded by the protocol of 1903.

1. II RDIP 345 2. *ibid.* 347 3. Subsequently the Italian government issued a Green Book pub. comprising papers which had been communicated in secret. This led to the recall of the French and Belgian ministers. France retaliated by doing the same. The Italian government apologized 4. Senate Doc. 533; 59 Cong. 1st. sess.





Shortly after the incident which we have just related Italy again became involved in a controversy over the responsibility of a state for the injuries resulting from civil war and upon this occasion Brazil was the country against whom the claims were made.<sup>1</sup> At the end of the revolution of 1893 the Brazilian Congress enacted a law on November 20, 1894, by which all claims of aliens were to be settled by a Brazilian court of claims instead of through diplomatic channels. It was claimed that this would be a more effective means of securing justice. Nevertheless, the claims of France, Spain, Germany, Austria-Hungary, Russia, Belgium and Denmark were settled through the regular diplomatic channels. <sup>2</sup>

By far the most numerous of the claims arising in Brazil were those of Italy, but unfortunately for her cause the Green Book which she had published relative to the Venezuelan claims and in which she expressed herself as disapproving the use of diplomatic means was utilized by the Brazilian government as ammunition against its author. Baron Blane in writing to the Italian minister to Brazil attempted to equivocate and to define the Italian position. 'Diplomatic intervention,' wrote he, 'should not be excessive. Cases of injury resulting from acts in violation of international law, committed by agents or authorities of the government against whom the claim is made are indeed different from injuries which are of other origin; such as are occasioned by the operations of ordinary man, or the acts of revolutionists or male-

1. 4 RDIP 406 2. Sao Paulo put a lump sum at disposal of Italy. Rio Grande appointed an investigatory commission. 3. This was a distinct victory for Brazil which parliament should have taken advantage of



factors in Municipal law. There is not doubt in the first case that the state should not be held responsible but in regard to the second cases, there is wanting all rational basis for governmental responsibility, at least when the government or its agents have clearly not failed to carry out their duties in preventing the possibility of the injury happening of which complaint is made...'

The list of Italian claims was presented March 11, 1885 to the Brazilian government. The latter however, repudiated all responsibility for injuries resulting from acts of insurrectos, and all cases of vis maior. 2. It then put forward and counter proposition which was rejected by the Italian government. After considerable negotiations the Italian and Brazilian ministers signed two protocols, one which provided for certain claims to be regulated by a mixed local commission and the other protocol which submitted the remaining question to the arbitration of the President of the United States. 3.

The Protocols were submitted to the Brazilian congress and amid an acrid discussion passed the first and second readings. Shortly after the second reading when popular excitement had reached its height, a riot took place in Sao Paulo in the course of which some 15 persons were killed and 50 wounded. In other cities too there were anti-Italian manifestations.

These events produced a profound effect in Italy. The Piemonte leaving M. Martino as minister plenipotentiary was sent to Brazil. All emigration to that country was forbidden and a flying squadron of four cruisers was sent to Brazil. All settlement was finally brought about by certain mutual concessions. A lump





sum of 4,000,000 fr. was granted to the settlement of all claims not otherwise regulated. This was considerably below the sum originally demanded.

The negotiations in this whole dispute reflected little credit upon Italian statesmanship. The most remarkable thing in the affair was the fact that Italy did not demand reparation for the insult to her flag in Sao Paulo. In fact the result might be regarded as a distinct for Brazilian diplomacy, and would decidedly have diminished the weight of foreign reclamation but for the success of the French claim for injuries sustained by a number of its subjects during the course of the same insurrection.

Three French citizens domiciled in the country had been murdered and claims for reparation were made by the French government. In a note of October 9, 1893 the Brazilian government replied that 'in cases of internal troubles the Brazilian government does not assume responsibility and that it is not violation of individual rights when by vis maior or in the legal exercise of public power it guarantees the security of the state or commits acts which may be injurious to individuals. The latter, whether aliens or nationals have no right whatever to an indemnity.

'This is the doctrine which has been given preference in the eyes of the leading publicists and in international practice.

'The government is therefore, not responsible for losses and injuries to which the protesting parties may have been exposed.

In spite of this declaration by Brazil in 1895 the French government received the sum of 900,000 fr by way of indemnity.



We have treated these reclamations against Brazil at some length, chiefly because of the fact that the years 1890-95 produced some of the most important cases of responsibility of the whole nineteenth century. We have already seen the results in the Aignes Mortes affair, both in Italy and France, the Chile, the Venezuelan and Brazilian cases. There remains yet for us to examine the reclamation made against the United States in these years for mob injuries.

The South American cases when contrasted with each other present some interesting points of difference and of similarity. In Chili we had a successful party of revolutionists freely acknowledging its responsibility; in Brazil and Venezuela a fierce repudiation of the right of foreign governments to claim indemnities for its nationals, on the one hand by a triumphant *de jure* government and on the other hand by the fortunate insurrectos. In these cases Italy's policy left at first in the hands of unskilled diplomats, was one of unfortunate vacillation, which is hardly to be compared with her successes in the Aignes Mortes affair and the lynching cases in the United States. In fact, it is difficult to reconcile Italy's actions in South America and her very pronounced expression of opinion in the other instances. France, on the other hand had her traditional success in securing a large indemnity for the number of her citizens and the same may be said of the United States.

In 1901 the United States had occasion to make reclamations against Brazil for an outrage committed on an American Baptist church. On the night of April 14 at Metteroy, a suburb of Rio de Janeiro a mob attacked and sacked the Baptist mission church. The furnishings books etc. were burned. The cause of the disturbance





was supposed to be the result of an expose by an ex priest of his former associates, a fact which aroused the catholics in the district. The President of the Province ordered the mission to be guarded and promised an examination of the claims and full redress. The promises were carried out.

We turn finally to the intervention of the powers in Venezuela in 1902 - 3, as a result of the refusal of that government to recognize its responsibility for injuries sustained by aliens during the course of the civil war of 1893-1901 and for its failure to carry out other of its international obligations. The case is certainly one of the most celebrated of all the numerous South American disputes. The claims of three of these nations, Great Britain, Germany and Italy were of especial importance and the refusal of Venezuela to recognize these demands led to the gravest results. The reclamations of Great Britain were based upon the seizure of certain vessels belonging to British subjects, and for injuries sustained by some of her nationals during the civil commotions. The Italian claims were chiefly for injuries sustained in a similar manner. The German claims were made the subject of a premonitory of the German Imperial Embassy to the United States government, on December 11, 1901. It enumerated certain contract claims and then continued:

'Through these wars - 1898-1900 many German merchants living in Venezuela, and many German landowners have been seriously damaged as partly compulsory loans have been extorted from them, partly requisites of war which have been found in their possession as especially the cattle necessary for feeding of the troops have been taken from them without being paid for, partly their houses and





grounds have been ransacked or devastated. The amount of these damages comes to fully 2,000,000 bolivars. This amount is to be divided between 35 claimants who are partly poor people. Several of the damaged have lost nearly all their possessions and through this their creditors who live in Germany have suffered likewise....

"Evidently the Venezuelan Government if we judge it after its behaviour in the present, is not willing to fulfill its engagements in compensating these damages. After having first fixed a six-monthly term during which the government refused to discuss any claims or compensation, the Government issued in January last a decree stating that a commission consisting solely of Venezuelan officials should decide about the claims which the damaged would have to bring to their knowledge during three months. The proceedings as settled by this decree seem in three article not to be acceptable. First of all, that all the claims for damage which came from time to time before the 23d. of May 1899 - that means before the appointment of the present President of the Republic, Castro - should not be considered, while, of course, the government of Castro is, as all other governments responsible for the deeds of his predecessors. Another article said that all diplomatic protestations against decisions of the commission should be excluded and only the appeal to the supreme Venezuelan court of justice should be admitted. The members of this court are entirely dependent on the government and have frequently been simply dismissed by the President. Finally the government wanted to pay for the claims which should be recognized by the commission only with bonds of a newly to be emitted revolution debt, which would be, after the experiences made up till the present without any value.



'The behaviour of the Venezuelan Government must therefore be considered as a frivolous attempt to avoid its just obligations.

It is difficult to prophesy what the future development in South America will be. It is possible that there will be an end to the constitutional, the statutory provisions, and perhaps to 'concession' clauses of non-responsibility, but the recent Saladorean law of 1906 leads us to believe that the treaties and international agreements of these countries will be the ground upon which these theories of non-responsibility and the repudiation of diplomatic intervention will make their last stand. It is not improbable that with the increasing resort to arbitration among these states many of the former difficulties will be more amicably adjusted. In fact this is the best solution to the problem thus far. The Latin American states have found that in monetary disputes the protection of the Monroe doctrine and the United States is not to be relied upon, and they should therefore accept arbitration as the most satisfactory solution of an embarrassing situation. The European states have demonstrated that they, on their part, intend to support the theory of responsibility and if they are willing to accept arbitration, the future will be clear. But, whatever the course may be which the Latin American states may follow, the fact will remain that the theory of responsibility must be recognized by them for it has become an integral part of international law which states can hardly repudiate without reflecting on their international prestige.





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